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# Petition and Transcript of Record

## Supreme Court of the United States

OCTOBER TERM, 1930

## No. 65

PERCIVAL E. MAGEE, PETITIONER,

*vs.*

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

**PETITION FOR CERTIORARI FILED MARCH 25, 1930**

**CERTIORARI GRANTED MAY 19, 1930**

**(34,892)**

# (34,892)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1929

# No. 761

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PERCIVAL E. MAGEE, PETITIONER,

*vs.*

THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 761

PERCIVAL E. MAGEE, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petitioner, Percival E. Magee, respectfully shows to this Honorable Court:

A.

The first question involves the statutory authority for the suit against the United States and the meaning and legal construction of the words "claims * * * against the United States" as used by Congress in Section 145 of the Judicial Code and the words "erroneously or illegally assessed or collected" as used in Section 3226 Revised Statutes, and the meaning and legal construction of the words "an overpayment" of tax and the clause "which [fol. 2] shall be credited or refunded" as used by Congress in Section 607 of the Revenue Act of 1928 (45 Stat. 874); and a determination whether the consent of the United States to be sued is given by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes, or by Section 607 of the 1928 Act.

The second question involves the meaning and legal construction of Section 611, entitled "Collection Stayed by Claim in Abatement," of the Revenue Act of 1928 (45 Stat. 875), and a determination of the meaning and legal construction of the clause "if a claim in abatement was filed"; the clause "within the period of limitation properly applicable thereto, assessed"; the clause "and if the collection

of any part was stayed"; and of the words "the payment of such part"; and a determination whether a legal claim in abatement was filed, whether the tax in question was assessed within the limitation period, whether the collection was stayed by a claim in abatement and whether the tax was paid in the manner contemplated by Congress.

The third question involves the constitutionality of Section 611 of the Revenue Act of 1928 as applied to the facts in this case; and a determination of the extent of the powers of Congress under the Sixteenth Amendment "to lay and collect taxes on incomes" and a determination whether or not the petitioner has been deprived of his property without due process of law or his property has been taken without compensation in violation of the Fifth Amend-
[fol. 3] ment.

The fourth question involves the meaning and legal construction of Section 9(a) of the Revenue Act of 1916 (39 Stat. 763), and of the words "shall be determined and assessed" as used by Congress in Section 250(d) of the Revenue Act of 1921 (42 Stat. 265, 266), to determine the retroactivity of the latter section and the legality of an assessment made after the expiration of the three-year period defined in Section 9(a) of the Revenue Act of 1916 and before the enactment of the Revenue Act of 1921.

## Statement

The petitioner filed his income tax return for the calendar year 1916 on February 27, 1917, and reported therein a tax in the amount of $10,419.35. On November 15, 1920, and after the expiration of the three-year period prescribed in Section 9(a) of the Revenue Act of 1916 (39 Stat. 763), the petitioner signed a document and waived the three-year limitation period as to assessment of additional tax in the amount of $6,911.30. This document was later signed by the Commissioner of Internal Revenue.

During the month of October, 1921, the Commissioner of Internal Revenue assessed additional tax in the amount of $64,982.12 instead of the said sum of $6,911.30. The claimant on November 15, 1921, filed a claim in abatement in the said amount of $64,982.12.

On receipt of a claim in abatement, it was common practice to hold up the collection of an additional assessment.

The collector of internal revenue acted in accordance with this practice in this case, and in the exercise of his discretion actually held up the collection of the additional assessment, and forwarded the said claim to the Commissioner of [fol. 4] Internal Revenue in due course.

On February 12, 1924, the Commissioner of Internal Revenue allowed the said claim in abatement in the amount of $21,952.28 and rejected it in the amount of $43,029.84.

On May 13, 1924, the collector made demand on the petitioner for the payment of the said sum of $43,029.84, which said sum, together with interest thereon in the amount of $4,841.19, was discharged by payments made on May 23, 1924, June 17, 1924, and July 11, 1925.

B.

Reasons for the Allowance of the Writ

1. The decision of the court below, with reference to the statutory authority for the suit, conflicts directly with the prior decision of that court in the case of Rock Island, Ark. etc. R. Co. v. United States, 54 Ct. Cl. 22, aff'd 254 U. S. 141, and with the decisions of this Court in the cases of Real Estate Savings Bank v. U. S. 104 U. S. 728; United States v. Houslef 237 U. S. 1; and United States v. Emery, Bird, Thayer Realty Co. 237 U. S. 28.

2. This case is of public importance because the holding of the court below, that it has authority to determine an overpayment of tax and to make a credit or refund under Section 607 of the Revenue Act of 1928, amounts to an invasion of the powers of the Executive under Article II of the Constitution.

[fol. 5] 3. The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the case of Graham and Foster Co-partners etc., petitioners, v. Goodcell, Collector, No. 589, October 1929 Term, in which case this Court has granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

4. The decision of the court below with reference to Section 611 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of United States v. Burden, Smith & Co., 33 Fed. (2d) 229.

5. The decision of the court below that the provisions of Section 250(d) of the Revenue Act of 1921 are to be construed to be retroactive to apply to an assessment previously made nullifies the clearly expressed intent of Congress, in the use of the words "shall be determined and assessed," that the provisions of the section should have application to subsequent assessments only made in the manner therein defined.

6. Assuming the provisions of Section 250(d) of the Revenue Act of 1921 are to be construed to be retroactive, then the holding of the court below, that the claim in abatement was lawfully filed, conflicts with the clearly expressed intent of Congress in Section 250(d) that "no claim in abatement * * * shall be entertained".

7. The holding of the court below that the word "stayed" is not to be given its ordinary or legal meaning is contrary to the clearly expressed intent of Congress as appears in Section 611 of the Revenue Act of 1928.

[fol. 6] 8. The holding of the court below that stay need not follow or result from the filing of the abatement claim conflicts with the title of Section 611 "Collection stayed by claim in abatement".

9. The conclusion of the court below that the collection of the tax was in fact stayed is contrary to the special finding of fact that the collector of Internal Revenue "in the exercise of his discretion actually held up collection".

10. The question of the constitutionality of Section 611 of the Revenue Act of 1928 is similar to that raised in the case of Graham and Foster, etc., petitioners, v. Goodcell, Collector, supra.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under seal of this Honorable Court, directed to the Court of Claims of the United States, commanding that court to certify and send

to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket, No. J-675, Percival E. Magee, Claimant, v. The United States, and that the finding of the Court of Claims may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Percival E. Magee, Petitioner, by Theodore B. Benson, Counsel for Petitioner.

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[fols. a & 1] IN THE COURT OF CLAIMS

No. J-675

PERCIVAL E. MAGEE, Claimant,

v.

THE UNITED STATES OF AMERICA

I. PETITION—Filed December 12, 1928

To the Court of Claims of the United States and to the Honorable the Chief Justice and Judges thereof:

The above claimant by this, his petition, respectfully shows:

1. The claimant is a citizen of the United States and a resident of the State of California with post office address at 409 Hollywood Security Building, Los Angeles, California. During the year 1916 and at the time of the filing of the income tax return hereinafter referred to the claimant was a resident of the State of California with post office address at Los Angeles, California.

2. The claimant has a just claim for refund of $47,871.03, being the additional taxes and interest thereon, paid to the Collector of Internal Revenue for the 6th District of California, on the dates hereinafter mentioned, as additional individual income and surtaxes and interest thereon, for the

calendar year 1916, which said sum was wrongfully assessed and collected by the Commissioner of Internal Revenue of the United States.

[fol. 2] 3. The provisions of law under which such wrongful assessment and collection were made are contained in Section 1 of an Act of Congress approved September 8, 1916, entitled "An Act to Increase the Revenue, and For Other Purposes" and known as the Revenue Act of 1916.

4. The provisions of law under which the claimant claims such refund are contained in Section 9(a) of the Revenue Act of 1916, Section 250(d) of an Act of Congress approved November 23, 1921, entitled "An Act to Reduce and Equalize Taxation, to Provide Revenue, and For Other Purposes" and known as the Revenue Act of 1921 and Section 3226 of the Revised Statutes of the United States.

5. Pursuant to the provisions of Section 3173 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided, the claimant, on February 27, 1917, and on official form No. 1040 made to the Commissioner of Internal Revenue his return of income and surtaxes for the said calendar year 1916 and reported therein the full sum of $10,419.35, which said sum was fully paid to the Collector of Internal Revenue for the 6th District of California within the time prescribed by law.

6. The Commissioner of Internal Revenue audited and revised the return of income and surtaxes so filed by the claimant and determined additional tax due in the amount of $6,911.30, as to which said sum the claimant and the Commissioner of Internal Revenue in a document dated November 15, 1920, agreed to waive the three-year Statute of Limitations as to the assessment of additional tax as provided [fol. 3] in said Section 9(a) of the said Revenue Act of 1916, a copy of which said document is annexed hereto as Exhibit "A."

7. Thereafter the Commissioner of Internal Revenue made a further examination and redetermined the amount of the additional tax to be $64,982.12, which said sum the Commissioner of Internal Revenue assessed on the October, 1921, list. On November 15, 1921, the claimant filed a claim

in abatement of the said sum of $64,982.12, which said claim was considered by the Commissioner of Internal Revenue and by letter dated April 19, 1923, the taxpayer was advised that the said claim would be allowed in the amount of $21,-952.28 and rejected in the amount of $43,029.84, and said amount was actually rejected by the Commissioner of Internal Revenue under date of February 12, 1924.

8. The assessment having been transferred to the Collector of Internal Revenue for the 6th District of California at Los Angeles, California, the said Collector for which District on May 13, 1924, made demand on the claimant for the said sum of $43,029.84, which said demand was discharged by the payment of $28,864.34 tax and $1,135.66 interest on May 23, 1924, and the payment of $11,116.26 tax and $3,039.62 interest on June 17, 1924, and by the payment of $3,049.24 tax and $665.91 interest on July 11, 1925, making a total payment of additional tax in the amount of $43,-029.84 and of interest in the amount of $4,841.19 or a total of tax and interest of $47,871.03.

9. On information and belief the claimant avers that the said sums so paid as original tax to the Collector of Internal Revenue for the 6th District of California and as ad-[fol. 4] ditional tax to the Collector of Internal Revenue for the 6th District of California were by the said officials turned over to and deposited in the Treasury of the United States as in the usual course of the business of such officials.

10. Pursuant to the provisions of Section 3220 of the Revised Statutes of the United States as amended, and pursuant to the provisions of other acts of Congress and on December 12, 1927, the claimant duly filed with the said Collector of Internal Revenue for the 6th District of California at Los Angeles, California, a claim for refund in the amount of $47,205.12, or such greater amount as is legally refundable, purporting to represent the said additional tax paid in the amount of $43,029.84 and interest paid thereon. The basis of such claim is that the said additional tax and interest was illegally collected from the claimant after the expiration of the statutory period in which the Commissioner of Internal Revenue could legally make such collection.

11. The Commissioner of Internal Revenue considered the said claim for refund so filed and by his letter dated September 11, 1928, advised the claimant that the said claim would be rejected in full.

12. The said sum of $47,871.03, representing additional tax and interest thereon, so paid to the said Collector of Internal Revenue, is wrongfully withheld from the claimant for the reason that it was collected from the claimant against his will and over his protest after the expiration of the statutory period allowed therefor by Section 9(a) of the said Revenue Act of 1916 and Section 250(d) of the said [fol. 5] Revenue Act of 1921 and the said amount so paid is, therefore, illegally withheld from the claimant.

13. Included in the said sum of $47,871.03 is the said sum of $40,959.73, representing the amount of additional tax and interest so collected from the claimant in excess of the sum of $6,911.30 agreed upon by the claimant and the Commissioner of Internal Revenue as the correct tax liability in the said document dated November 15, 1920, which said document is a contract and is binding on the claimant and the Commissioner of Internal Revenue as to both the amount of the additional tax due and as to the time it could be legally assessed and collected and being a contract properly entered into by the parties on November 15, 1920, remains in full force and effect.

14. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. He has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. He is and always has been the sole and absolute owner of the claim here presented. He has made no transfer or assignment of said claim or of any part thereof or of any interest therein. He is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

15. The claimant believes the facts as hereinabove stated to be true.

Wherefore the claimant prays judgment against the United States of America upon the facts and law for

[fol. 6] $47,871.03, together with interest thereon from the several dates of payment, and its reasonable costs and disbursements.

Percival E. Magee, Claimant. Theodore B. Benson, Attorney for Claimant.

*Duly sworn to by Percival E. Magee. Jurat omitted in printing.*

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[fol. 7] EXHIBIT "A" TO PETITION

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Percival E. Magee, hereby waive the three-year limitation in regard to the assessment of additional taxes for the year 1916 to the amount of $6,911.30 as disclosed by the investigation made for that year by Revenue Inspector B. C. Middleton.

(Signed) Percival E. Magee. D. H. Blair, Commissioner.

This November 15, 1920.

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[fol. 8] II. GENERAL TRAVERSE—Filed January 21, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

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III. ARGUMENT AND SUBMISSION

On December 5, 1929, this case was argued and submitted on merits by Mr. Theodore B. Benson, for plaintiff, and by Mr. Lisle A. Smith, for defendant.

[fol. 9] IV. Special Findings of Fact, Filed January 20, 1930, as amended by the order of February 17, 1930, Conclusion of Law, and Opinion of the Court by Green, J.

Mr. Theodore B. Benson for plaintiff. Mr. Lisle A. Smith, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of facts entered into by the parties hereto, makes the following

SPECIAL FINDINGS OF FACT

In February, 1917, plaintiff made his return of income taxes for the year 1916 to the Commissioner of Internal Revenue and reported therein taxes in the sum of $10,419.35, which was accordingly paid by plaintiff. Later the commissioner audited this return and assessed additional taxes against plaintiff in the amount of $6,911.30. On November 15, 1920, plaintiff executed a waiver of the three-year limitation in regard to the assessment of additional taxes to the amount of $6,911.30 for the year 1916, as above set forth, which waiver was also signed by the commissioner. Thereafter, the commissioner made a further examination and redetermined the amount of the additional tax; and instead of $6,911.30, fixed it at $64,982.12, which was assessed in the month of October, 1921. After receiving from the collector of internal revenue a ten-day notice and demand for payment, the plaintiff, on November 15, 1921, filed with the collector a claim in abatement of the said sum of $64,982.12, which claim was forwarded by the collector to the commissioner, and by the commissioner considered. By letter dated April 19, 1923, the plaintiff was advised that the commissioner proposed to allow said claim in the amount of $18,960.40 and reject it in the amount of $46,021.71.

On receipt of a claim in abatement, it was common practice to hold up the collection of an additional assessment. The collector of internal revenue acted in accordance with this practice in this case, and in the exercise of his discretion actually held up the collection of the additional assessment, and forwarded the said claim to the Commissioner of Internal Revenue in due course. The collector made no

further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

[fol. 10] The plaintiff protested the determination of the commissioner, as above set forth, and his appeal was transmitted to the committee on appeals and review, which, after oral hearings, sustained the commissioner upon all points except one, on August 9, 1923. In compliance with the recommendation of said committee, a certificate of overassessment in the amount of $21,952.28 was prepared and issued to the plaintiff by the commissioner; and on February 12, 1924, the commissioner formally allowed the claim in abatement in the amount of $21,952.28, and rejected it in the amount of $43,029.84, for which sum with interest the collector, on May 13, 1924, made demand on plaintiff. In compliance with this demand, the plaintiff made payment as follows:

| | |
|---|---|
| May 23, 1924: | |
| Tax | $28,864.34 |
| Interest | 1,135.66 |
| June 17, 1924: | |
| Tax | 11,116.26 |
| Interest | 3,039.62 |
| July 11, 1925: | |
| Tax | 3,049.24 |
| Interest | 665.91 |
| Total of tax and interest | 47,871.03 |

On December 12, 1927, the plaintiff filed with the commissioner a claim for refund in the amount of $47,205.12, representing the said additional tax in the amount of $43,029.84, together with interest thereon. This claim for refund was considered by the Commissioner and rejected.

The parties agree that in this case there is no deficiency nor part of a deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234 of the revenue act of 1918 or the revenue act of 1921.

## Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

## Opinion

Green, Judge, delivered the opinion of the court:

This is a suit begun to recover $47,871.03, upon a claim for refund of taxes filed by the plaintiff on December 12, 1927, and rejected by the Commissioner of Internal Revenue.

The facts in the case are not in dispute. Plaintiff filed his individual income-tax return for the calendar year 1916 with the collector of internal revenue, and paid the amount shown to be due by the return in 1917. Thereafter, the Commmissioner of Internal Revenue audited the return and determined that an additional tax was due in the sum [fol. 11] of $6,911.30, and on November 15, 1920, the plaintiff and the commissioner signed a so-called waiver, by which plaintiff waived the three-year limitation in regard to the assessment of additional taxes for the year 1916, for $6,911.30. The additional assessment of $6,911.30, however, is only mentioned in the sequence of events as it has no bearing on the questions involved in the case, and the claim made by plaintiff that by signing the waiver the commissioner agreed that no change should be made in the assessment has no foundation in law or fact.

Thereafter the commissioner made a further examination of plaintiff's income-tax return, and during the month of October, 1921, made an additional assessment of $64,982.12, for which notice and demand for payment was sent to plaintiff, who thereupon on November 15, 1921, filed a claim in abatement for the full amount of such additional assessment.

The parties agree that upon receipt of the claim in abatement it was common practice to hold up the collection of an

additional assessment. Following this practice, the collector refrained from the collection of an additional assessment and forwarded the claim in abatement to the commissioner. The collector made no further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue.

The claim in abatement was formally allowed by the commissioner on February 12, 1924, in the amount of $21,952.28, and was rejected in the amount of $43,029.84, for which sum notice and demand was sent by the collector to the plaintiff May 13, 1924. Plaintiff discharged the demand by the payment thereof with interest in three installments, two in 1924 and one in 1925, the total amount of tax and interest so paid being $47,871.03.

As before stated, the plaintiff filed a claim for refund which was disallowed. The amount of this claim was $47,205.12, representing the additional tax of $43,029.84 together with interest thereon.

Two propositions are presented by plaintiff which constitute the issues in the case: First, that the assessment of the tax was illegal, being made after the expiration of the statute of limitations applicable thereto, which as plaintiff claims was a three-year period prescribed in section 9 (a) of the revenue act of 1916; second, that sections 607 and 611 of the revenue act of 1928 have no application to the facts in the case at bar, or if held to be applicable so as to deprive plaintiff of the right to maintain its action to recover the taxes in controversy section 611 is unconstitutional and void.

The contention that the assessment of the tax was illegal is based on the theory that the statute of limitations applicable to the assessment of the tax was section 9 (a) of the revenue act of 1916. We think it manifest that the period of limitations was that prescribed by the 1921 act. This act did not go into effect until November 23, 1921, but by its terms it was expressly made retroactive to January 1, 1921, and the assessment in controversy was made in October, 1921. The 1921 act repealed the provisions of the 1916 act which refer to the matters in controversy in this case and provided that the amount of any "taxes due under any return made under this act for prior taxable years or under

prior income, excess-profits, or war-profits tax acts * * * shall be determined and assessed within five years after the return was filed." In this case the taxes were due "under [fol. 12] prior income * * * tax acts." The 1921 act having been made retroactive with reference to assessments, its effect in this case was the same as if it had been enacted on January 1, 1921, and had been in force when the assessment was made. It therefore appears to us clear that the five-year limitation of the 1921 act applied, and that the assessment, having been made within five years from the time when the original return was made by plaintiff, was not barred by limitation. Defendant claims that, as applied to the facts in this case, there was no limitation provided by the 1916 act for the assessment of taxes. As we hold that the 1916 act does not apply, it becomes unnecessary for us to pass upon the point thus raised.

Discussing the second proposition presented by plaintiff, it will be observed that the tax involved herein was not collected until more than five years after the filing of the return and the defendant concedes that under the decision in Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, plaintiff can recover the amount so collected unless prevented by the provisions of sections 607 and 611 of the act of 1928. These two sections are set out in full and discussed at length in the case of Oak Worsted Mills v. United States, No. J-180, decided by this court December 2, 1929, but as there is a claim that the facts in this case are somewhat different from those in the Oak Worsted Mills case, supra, we again quote from the 1928 act these two sections, as follows:

"Sec. 607. Effect of Expiration of Period of Limitation against United States.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement.—If any internal-revenue tax (or any interest, penalty, ad-

ditional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Coming now to a consideration of the contention of the plaintiff that sections 607 and 611 of the act of 1928 have no application to the case at bar, we find that it is based on two propositions:

First, that the tax in question was not assessed within the period of limitations and hence is not covered by section 611.

Second, that section 611 applies only to cases where a claim in abatement was filed and the collection of the tax was thereby stayed.

Our views on the first of these two propositions have already been expressed and we have found that the tax being assessed under the 1921 act, was assessed "within the period of limitation properly applicable thereto" as required by section 611.

The second proposition has in most respects been discussed at length in the Oak Worsted Mills case, wherein we held that Congress in section 611 did not refer to a legal stay existing by virtue of the plea of abatement, for such a thing did not exist. At no time did the law contain [fol. 13] any provision for a plea of abatement bringing about a stay and at no time did it in fact legally stay the collection of the tax. Plaintiff's claim therefore is in substance that section 611 applies only to cases which never have arisen and never could arise. It has been said in some decisions that have been called to our attention that taxing statutes should be construed liberally in favor of the taxpayer, but this rule surely has some limits and ought not to be applied where the intent of Congress is so clearly manifest as it is in this matter. The report of the Ways and Means Committee upon the act of 1928, which

so far as it pertains to section 607 and 611, is set out in full in the Oak Worsted Mills case, shows very plainly what Congress intended. It states that—

"Prior to the enactment of the revenue act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment taxpayers were frequently *permitted* to file claims in abatement with the collector *and thus delay the collection* until the claim in abatement could be acted upon." (Italics ours.)

It thus appears that what Congress had in mind was the delay of the collector in collecting a tax brought about by the filing of the claim in abatement. The stipulation in the case at bar shows that it was the practice where a claim in abatement was filed to "hold up" the collection of the tax until the claim in abatement had been passed upon and that the collector acted in accordance with the practice in the instant case. The rule contended for by plaintiff with reference to the construction of statutes liberally can not, we think, be expanded so as to make the statute meaningless and useless, for this is not liberality of construction but extreme technicality. As we said in the Oak Worsted Mills case, the general rules with reference to construction of statutes require that they should be construed so as to give effect to the intent of the legislative body which enacted them. The intent is, we think, quite manifest from the language of section 611 itself, especially when it is applied to the situation which we have described above, under which claims in abatement never acted as a legal stay. If anything more is needed, it is found in the report of the committee, which definitely sets out the intent of the proposed law.

In one respect this case is different from that of the Oak Worsted Mills case. The assessment was made under the 1921 law and plaintiff calls attention to a provision in that act providing that in certain cases, "no claim in abatement of the amount so assessed shall be entertained." This provision is found in subdivision (d) of section 250. This subdivision provided that a taxpayer should be notified when a deficiency in a tax was discovered and given thirty days in which to file an appeal and show cause or reason why the tax or deficiency should not be paid; also that opportunity for hearing should be granted. When the

notice of the deficiency was served in the instant case, the plaintiff filed the claim in abatement which might be considered his showing of a "cause or reason why the tax or deficiency should not be paid." Until after there was a decision on this showing, there was nothing forbidding a claim in abatement to be entertained. The law required final decision to be made "as quickly as practicable," but "any tax or deficiency in tax then determined to be due" was then required to be paid within ten days after notice [fol. 14] and demand. Stated concisely, the statutory requirements were that when a deficiency was found, the taxpayer should be notified and given an apportunity to show cause why it should not be paid. No particular form was required for this showing, and it should be kept in mind that it is only after the determination and assessment of the tax that the statute says "no claim in abatement of the amount so assessed shall be entertained." There was nothing in the law forbidding the filing of a plea in abatement before determination and assessment, and plaintiff filed his plea in abatement after notice of the deficiency but prior to such determination. It was the common practice to so file pleas in abatement and have them considered before final determination of the tax was made. In fact, this was a perfectly logical and natural way for the taxpayer to present his claim that the taxes assessed against him ought to be reduced and there was nothing in the statute forbidding the taxpayer following this method in presenting his case. In the instant case the plea of abatement was considered by the commissioner and in part granted and in part refused, which action constituted the decision of the commissioner. Under the particular circumstances of this case, neither the statute nor the facts support the contention of plaintiff that the filing of the plea of abatement was forbidden by law.

The plaintiff contends that while this court has authority to determine a refund and enter judgment for its payment, it has no authority to determine an overpayment. But what is it that is refunded? Certainly nothing but an overpayment, and the finding of an overpayment is necessary in order to establish the right to a refund. All the works on income taxes so treat this matter. When suit is brought in this court on a claim against the United States,

if it is one within its jurisdiction, the court has power to adjudicate and determine all matters necessary to the establishment of the validity of the claim. The argument made by plaintiff on this point is without weight.

The plaintiff also contends that while section 1106 (a) of the act of 1926 was repealed as of the date of its enactment by the 1928 act, a right had been vested in plaintiff to bring this suit which could not be taken away by the repeal of the statute or by sections 607 and 611 of the act of 1928.

The questions arising on this point have been so fully discussed in the case of Gotham Can Co. v. United States, No. J-255, this day decided by this court, that we think nothing further need be added. We adhere to our conclusion in the case last named that section 1106 did not confer upon the plaintiff any right to maintain an action against the Government for taxes collected prior to the passage of the 1926 act unless the tax had been overpaid. As no such right was vested, none was taken away and therefore no constitutional principle is violated. The facts in the case at bar are precisely similar so far as the application of section 1106 is concerned.

It follows from what has been said that plaintiff's action must be dismissed and it is so ordered.

Williams, Judge; Littleton, Judge; Graham, Judge; and Booth, Chief Justice, concur.

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[fol. 15] V. JUDGMENT

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

By the Court.

---

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On February 8, 1930, the plaintiff filed a motion for correction of special findings of fact.

On February 17, 1930, the court entered the following order on said motion:

Order

Upon consideration of plaintiff's motion for modification of the Special Findings of Fact, it is ordered that the words "in the same year" following the word "later" in the fourth line of the Findings be stricken out, and the motion sustained to that extent, otherwise overruled.

February 17, 1930.

By the Court.

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[fol. 16] Clerk's certificate to foregoing transcript omitted in printing.

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Endorsed on cover: File No. 34,892. Court of Claims. Term No. 761. Percival E. Magee, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed March 25, 1930. File No. 34,892.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 19, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, the briefs and argument to be limited to the question of the effect and validity of Sec. 611, Revenue Act, 1928. It is also ordered that this case be, and the same is hereby, assigned for argument immediately following No. 589, Graham et al. vs. Goodcell, Former Collector.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

APR 14 193

# Supreme Court of the United States.

OCTOBER TERM, 1929.

## No. [redacted]. 65

PERCIVAL E. MAGEE, PETITIONER,

*v.*

THE UNITED STATES.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

THEODORE B. BENSON,
*Counsel for Petitioner.*

(34,892)

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1929.

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## No. 761.

---

PERCIVAL E. MAGEE, PETITIONER,

*v.*

THE UNITED STATES.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

### I.

### Opinion of the Court Below.

The opinion of the Court of Claims has not as yet been officially reported but will be found printed at R. 9–18.

### II.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(6) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered on January 20, 1930 (R. 18). Application for writ was presented March 25, 1930.

The suit brought in the Court of Claims is for the recovery of individual income tax erroneously and illegally assessed and collected (R. 2), jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

## III.

## The Facts.

The facts of the case are printed in the petition (R. 2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

## IV.

## The Statutes Involved.

Section 145 of the Judicial Code as applicable here reads as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
> (1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *." (36 Stat. 1136.)

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, reads as follows:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of

filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 607 of the Revenue Act of 1928 reads as follows:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 611 of the Revenue Act of 1928 reads as follows:

"*Collections Stayed by Claim in Abatement*—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed,with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

## V.

### Specification of Errors.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the reversal of the decision of the Court of Claims are:

1. The court below erred in holding that the consent of the

United States to be sued for the recovery of a tax illegally collected is conferred by Section 607 of the Revenue Act of 1928.

2. The court below erred in refusing to hold that the consent of the United States to be sued for the recovery of a tax illegally collected is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

3. After holding that the consent of the United States to be sued is conferred by Section 607 of the Revenue Act of 1928 and that the provisions thereof and of Section 611 of the same Act apply to a suit for the recovery of a tax illegally collected, the court below further erred in holding that this case comes within the provisions of Section 611 because:

a. The provisions of the section are not to be construed to be retroactive.

b. The tax in question was not timely assessed, having been assessed after the expiration of the three-year period defined in Section 9(a) of the Revenue Act of 1916 and before the enactment of the Section 250(d) of the Revenue Act of 1921.

c. Assuming the correctness of the decision below that Section 250(d) of the Revenue Act of 1921 is retroactive to January 1, 1921, then the holding that a claim in abatement was legally filed conflicts with the express terms of Section 250(d) which prohibits the filing of a claim in abatement.

d. The collection of the tax was never stayed by a claim in abatement, nor otherwise, the court having specially found that the collector of internal revenue acted in his own discretion in holding up the collection.

e. The tax was not voluntarily paid.

4. The court below erred in holding that Section 611 is constitutional.

## VI.

## The Argument.

### Summary of Argument.

*A*. The period of limitation within which the tax in question legally could have been collected is that contained in Section 250(d) of the Revenue Act of 1921.

*B*. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The consent of the United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provision of Section 607 nor of the exception thereto in Section 611 of the same Act.

2. Section 611 of the Revenue Act of 1928 is not to be construed to be retroactive.

3. The tax in question was not timely assessed, having been assessed after the expiration of the three-year period defined in Section 9(a) of the Revenue Act of 1916 and before the enactment of Section 250(d) of the Revenue Act of 1921.

4. No lawful claim in abatement was ever filed.

5. The collection of the tax was never stayed by a claim in abatement nor otherwise, the court below having specifically found that the collector of internal revenue acted within his own discretion in holding up the collection.

6. The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment."

*C*. Section 611 of the Revenue Act of 1928 if construed to apply to this case would be unconstitutional because:

1. In the enactment of Section 611 Congress exceeded the power conferred on it by the Sixteenth Amendment to lay and collect taxes on incomes.

2. If Section 611 is construed to apply it would amount to the deprivation of property without due process of law and to the taking of property without just compensation.

**Argument.**

The decision below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.*, 33 Fed. (2d) 229, and the questions in this case are substantially the same as those presented in the petition in the case of *Graham and Foster, Copartners, etc.*, v. *Goodcell, Collector*, No. 589, October, 1929, Term, in which this Court has granted a writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit.

The application for the writ in the *Graham and Foster* case was not opposed by the Attorney General and counsel therefore submits that the writ should be granted in this case.

**Conclusion.**

It is, therefore, respectfully submitted that this case, like that of *Graham and Foster, Copartners, etc.*, v. *Goodcell, Collector, supra,* is one calling for and demanding the exercise by this Court of its supervisory powers, in order that there may be a final determination and construction of the provisions of Section 607 and 611 of the Revenue Act of 1928 and that to such end the writ of *certiorari* should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

THEODORE B. BENSON,
*Counsel for Petitioner.*

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CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1930.

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## No. 65

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PERCIVAL E. MAGEE, PETITIONER,

*v.*

THE UNITED STATES, RESPONDENT.

---

## Brief for Petitioner.

---

THEODORE B. BENSON,
Washington, D. C.
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# Supreme Court of the United States.

OCTOBER TERM, 1930.

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**No. 65**

---

PERCIVAL E. MAGEE, PETITIONER,

*v.*

THE UNITED STATES, RESPONDENT.

---

## BRIEF FOR PETITIONER.

---

### STATEMENT OF THE CASE.

This is a suit brought by the petitioner in the Court of Claims to recover additional income tax for the calendar year 1916 in the amount of $47,871.03, collected after the expiration of the five year period for collection prescribed by Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265. To the petitioner's cause of action the respondent relied on Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, and the Court of Claims held (R. 12 et. seq.) that the provisions of Section 611 are to be construed to defeat the right of the petitioner to sue and as so construed the provisions of the section are constitutional (37 F. (2d) 763).

This Court granted a writ of certiorari (50 S. Ct. 407) to review the decision of the court below and in granting the writ limited it to the question of the effect and validity of Section 611 of the Revenue Act of 1928.

Unless otherwise indicated the italics of this brief are those of the petitioner.

## I.

## Opinion of the Court Below

The opinion of the court below was rendered by the Court of Claims on January 20, 1930, in the case of this petitioner against the United States, No. J-675 on the records of that court. The opinion has been reported in 37 F. (2d) 763, and is a part of the record on this appeal (R. 12–18).

## II.

## Jurisdiction.

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(b) of the Act of February 13, 1925 (45 Stat. 936).

The date of the decree of the Court of Claims sought to be reversed is January 20, 1930 (R. 18). The petition applying for the writ of certiorari was filed on March 25, 1930, and was granted May 19, 1930.

## III.

## Statement of the Facts.

The petitioner filed his income tax return for the calendar year 1916 on February 27, 1917, and reported therein a tax in the amount of $10,419.35.

During the month of October, 1921, the Commissioner of Internal Revenue assessed additional tax in the amount of $64,982.12. The petitioner on November 15, 1921, filed a claim in abatement in the said amount of $64,982.12.

On receipt of a claim in abatement, it was common practice to hold up the collection of an additional assessment. The collector of internal revenue acted in accordance with this practice and, in the exercise of his discretion, actually held up the collection of the additional assessment and forwarded the claim to the Commissioner of Internal Revenue in due course.

On February 12, 1924, the Commissioner of Internal Revenue allowed the claim in abatement in the amount of $21,952.28 and rejected it in the amount of $43,029.84. On May 13, 1924,

the collector made demand on the petitioner for the payment of the sum of $43,029.84, which said sum, together with interest thereon in the amount of $4,841.19, was discharged by payments made on May 23, 1924, June 17, 1924, and July 11, 1925 (R. 10, 11).

## IV.

## Specification of Errors.

The errors of the Court of Claims with reference to the effect and validity of Section 611 of the Revenue Act of 1928 and which the petitioner urges as grounds for the reversal of the decision are:

1. The court below erred in holding that the consent of the United States to be sued for the recovery of a tax illegally collected is conferred by Section 607 of the Revenue Act of 1928 and that the provisions of Section 611 of the act deprive the petitioner of the right to sue.

2. The court below erred in not holding that the consent of the United States to be sued for the recovery of a tax illegally collected is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

3. The court below erred in not holding that Section 611 does not apply because no tax was assessed within the applicable limitation period, no legal claim in abatement was filed, collection of no part of the tax was stayed, and payment was not voluntary.

4. The court below erred in not holding that to the extent that Section 611 may be construed to limit the authority of the Commissioner of Internal Revenue to refund the tax illegally collected or the right of the petitioner to recover it, the section has been repealed and superseded by the later act of Congress, Section 3220 of the Revised Statutes, as amended.

5. The court below erred in not holding that to construe Section 611 of the Revenue Act of 1928 to apply to this case to deprive the petitioner of the amount of the tax illegally col-

lected from him and of his right to sue to recover it would cause the section to violate the Fifth Amendment to the Constitution.

6. The court below erred in dismissing the petition.

## V.

## The Questions Presented.

The questions presented in the application for the writ are, is Section 611 of the Revenue Act of 1928 (45 Stat. 791, 875) to be construed to take from the petitioner his right and title to an amount illegally collected from him as a tax, after the expiration of the statutory period for collection, and to deprive him of the right to recover it; and, if to be so construed, does Section 611 violate the Fifth Amendment to the Constitution?

The petitioner submits, however, that a full consideration of these questions is not necessary to a decision of the case for the reason that, to the extent that it may be construed to apply to this case, Section 611 has been repealed and superseded by the later act of Congress in Section 3220, as amended, which has come to counsel's attention since the application for the writ.

## VI.

## The Argument

### Summary of Argument.

A. **SECTION 611 DOES NOT APPLY.**

1. Section 611 is merely an exception to Section 607 of the Revenue Act of 1928 and is one of the mandatory administrative provisions which make it the duty of the Commissioner of Internal Revenue to credit or refund an overpayment and the section is not a limitation on the authority of the Commissioner to remit or pay back a tax illegally collected nor is the section a limitation on the petitioner's right to sue.

2. No internal-revenue tax was assessed "within the period of limitation properly applicable thereto," no legal claim in abatement was filed, the collection of no part of the tax was stayed and payment was not voluntarily made.

**B. TO THE EXTENT THAT IT MAY BE CONSTRUED TO APPLY SECTION 611 HAS BEEN REPEALED.**

To the extent that its terms or provisions may be construed to limit or to in any manner affect the authority of the Commissioner to refund or pay back or the right of the petitioner to recover a tax illegally collected, Section 611 has been repealed and superseded by the later act of Congress in Section 3220 of the Revised Statutes as amended and reenacted May 29, 1928.

**C. SECTION 611, IF NOT REPEALED AND IF TO BE CONSTRUED TO APPLY, WOULD BE UNCONSTITUTIONAL.**

The petitioner would be deprived of his property without due process of law and would amount to the taking of property without compensation in violation of the Fifth Amendment to the Constitution.

## POINT A.

## SECTION 611 DOES NOT APPLY

**Section 611 is merely an exception to Section 607:**

Section 611 of the Revenue Act of 1928 provides that the payment of an internal-revenue tax, under certain conditions, "shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." Section 607, to which reference is made in Section 611, provides that a tax paid after the expiration of the period of limitation "shall be *considered* an overpayment and shall be credited or refunded."

That Section 611 is merely an exception or limitation to the provisions of Section 607 is, the petitioner submits, too clear for argument. Section 611 can have application only in the event it is held that the petitioner, in order to recover, must rely on the provisions of Section 607. The petitioner filed claim for refund under Section 3220 of the Revised Statutes and brought suit under the provisions of Section 145 of the

Judicial Code and Section 3226 of the Revised Statutes and does not rely on the provisions of Section 607 (*United States* v. *Emery, Bird, Thayer Realty Company*, 237 U. S. 28, 35 S. Ct. 499). The provisions of Section 611 do therefore not apply.

**Sections 607 and 611 merely modify provisions in prior acts.**

Congress provided that the Revenue Act of 1928 should apply only to the year 1928 and succeeding years and that taxes for prior years should not be affected *except as modified* by the provisions of the act. This appears in Section 1 of Title I (45 Stat. 795) which reads:

> "The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, *except as such provisions are modified by Titles* III, IV, *and* V *of this Act* or by legislation enacted subsequent to this Act."

Sections 607 and 611 appear in Title IV—Administrative Provisions—(45 Stat. 874, 875) and must be construed, in accordance with Section 1, to *modify* "*the applicable provisions of prior revenue Acts.*" Sections 607 and 611 are, in fact, not full and complete in themselves. Section 607 merely modifies the definitions of an excess payment found in Section 252 of the Revenue Acts of 1918 and 1921 (42 Stat. 268) and of an overpayment found in Section 272 of the Revenue Acts of 1924 (43 Stat. 296), and 1926 (44 Stat. 55), *by adding thereto* the amount of the tax paid after the expiration of the statutory period for collection. This is explained by the Ways and Means Committee of the House, 70th Congress, First Session, Report No. 2, at page 33:

> "Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment * * * or after the expiration of the period of limitation on collection by distraint or court proceedings * * *. *An overpayment*

*under section 607 is to be credited or refunded the same as any other payment.*"

**The provisions modified are those relating to the credit or refund of an overpayment and have no relation to the refund of a tax illegally collected:**

Throughout the several revenue acts beginning with Section 252 of the Revenue Act of 1918 and continuing through Section 322 of the Revenue Act of 1928 (45 Stat. 861), Congress has made it the duty of the Commissioner of Internal Revenue to credit or refund excess payments or overpayments. Section 252 of the Revenue Act of 1918, in which an excess payment is referred to, reads in part:

> "That if, upon an examination of any return * * * it appears that an amount of income, war-profits or excess-profits tax, has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, *the amount of the excess shall be credited* against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return *and any balance of such excess shall be immediately refunded* to the taxpayer: * * *"

Congress in the enactment of the Revenue Act of 1921 made no material change in Section 252 of the Revenue Act of 1918 nor is there any material change in the amendment to Section 252 of the Revenue Act of 1921 by the Act of March 4, 1923. In the enactment of the Revenue Act of 1924, Congress made a slight change in terminology and referred to overpayments instead of excess payments. Section 272 of the Revenue Act of 1924 entitled "Overpayments" reads in part:

> "* * * If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281."

Section 281 (43 Stat. 301), which is referred to in Section 272 above, is entitled "Credits and Refunds" and subparagraph (a) reads in part:

> "Where there has been an overpayment * * * the amount of such overpayment shall be credited against any income, war-profits or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

The regulations of the Treasury Department promulgated pursuant to the provisions of Section 252 of the Revenue Acts of 1918 and 1921, and Sections 272 and 281 of the Revenue Act of 1924, disclose that these sections have been construed to apply to the Commissioner of Internal Revenue in the crediting or refunding of overpayments. Article 1221 of Regulations 65 promulgated for the enforcement of Section 272 of the Revenue Act of 1924 reads:

> "OVERPAYMENTS—If upon examination of the return *the Commissioner finds* that the taxpayer has paid as an installment an amount greater than the correct amount of such installment, the excess of such payment over the correct amount of such installment *shall be credited* against any unpaid installments. If the amount already paid exceeds the amount determined to be the correct amount of the tax, the excess shall be credited against any other income, war-profits, or excess-profits tax or installment due from the taxpayer, or, if there is no such tax or installment against which such credit may be made, the excess shall be refunded in accordance with the provisions of section 281 of the statute."

The Revenue Act of 1926 is similar to the Revenue Act of 1924 and Congress in Sections 272 and 284 (44 Stat. 66) again referred to overpayments and credits and refunds. Article 1301 of Regulations 69 promulgated for the enforcement of the Revenue Act of 1926 reads:

> "Authority for the credit and refund of any overpayment * * * is contained in Section 284."

In the Revenue Act of 1926 Congress, however, added Section 1106(a) (44 Stat. 113) which reads in part:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only

> operate to bar the remedy but shall extinguish the liability; *but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax.* * * *"

The provisions of the several acts which make it the duty of the Commissioner of Internal Revenue to credit an overpayment or to refund any remaining balance are purely administrative and mandatory and are included in the several acts along with other provisions relating to *the audit of the returns* and the making of assessments. These are purely routine duties which Congress has prescribed that the Commissioner *shall* perform. The provisions of the statutes have application to such duties only and have no bearing on the authority of the Commissioner to pay back a tax illegally collected nor on the right of a taxpayer to recover a tax so collected. *Fox* v. *Edwards*, 287 Fed. 669.

The provisions of Section 1106(a) of the Revenue Act of 1926, that "no credit or refund * * * shall be allowed unless the taxpayer has overpaid the tax" was considered in *Ellay Company* v. *Bowers*, 25 F. (2d) 637, certiorari denied, 48 S. Ct. 601, after the enactment of Section 611 of the Revenue Act of 1928, and Judge Manton of the United States Circuit Court of Appeals for the Second Circuit stated:

> "* * * Nor does 1106(a) of the Act of 1926 render uncertain the right of the taxpayer to recover the tax after payment where the bar of the statute has set in. The phrase of the statute 'but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax,' must be read in the light of the other provisions of the same section. *That clause in no wise affects the right of the taxpayer to recover in appropriate suit after payment.*"

*Separate and distinct from the provisions in the several revenue acts relating to the audit of returns and credits or refunds of overpayments, Congress has in Section 3220 of the Revised Statutes, at different times amended, authorized the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, to remit, refund and pay back all taxes erroneously or illegally assessed or collected.*

The provisions of the several revenue acts and of the revised statutes are to be read to mean that Congress has made separate provisions for the crediting or refunding of an overpayment and for the paying back of a tax erroneously or illegally assessed or collected. In the provisions of the revenue acts the Commissioner is *directed* to make the credit or refund, while in the Revised Statutes he is *authorized* to pay back, under regulations prescribed by the Secretary of the Treasury, a tax erroneously or illegally assessed or collected.

In the regulations promulgated by the Secretary of the Treasury for the enforcement of the several revenue acts, provisions are made for the paying back of taxes erroneously or illegally assessed or collected. These provisions appear in Article 1031 of Regulations 45, Article 1031 of Regulations 62, Article 1031 of Regulations 65, and Article 1301 of Regulations 69. In Regulations 69 the distinction between the duty to credit or refund an overpayment and the authority to pay back a tax erroneously or illegally assessed or collected is recognized by the following provision in Article 1301:

> "Authority for the credit and refund of any overpayment of any * * * tax * * * is contained in section 284. General authority for the remitting or refunding of taxes erroneously or illegally assessed or collected is found in section 3220 of the Revised Statutes * * *."

The petitioner submits that the provisions of Sections 607 and 611 of the Revenue Act of 1928 modify the provisions of Sections 272 and 284 of the Revenue Act of 1926 and their full force and effect is that Section 607 enlarges the definition of an overpayment to include a tax collected after the bar of the statute of limitations and that Section 611 merely limits the definition in 607 by taking from it a tax paid where an abatement claim was filed under certain conditions. The provisions of Sections 607 and 611 can not be construed to in any way modify the provisions of Section 3220 of the Revised Statutes, as amended, and do not in any sense limit the authority of the Commissioner of Internal Revenue to pay back a tax collected after the bar of the statute of limitations.

The courts have no authority to take the necessary steps to make a credit of an overpayment for one year to a tax due for another. The courts are not prepared to audit the returns for the several years. Further, the making of the credit requires the assessment of a tax for the year to which credited. The making of an assessment, like the audit of the return, is a purely administrative procedure which the courts have no authority to perform. The Commissioner of Internal Revenue alone can audit and examine a return, make an assessment of a deficiency and credit a tax paid for one year to another. The petitioner submits that Section 607 must therefore be construed to apply solely to the Commissioner in making credits or refunds of overpayments.

**Sections 607 and 611 are not to be construed to affect the right of the petitioner to sue:**

*If the provisions of Sections 607 and 611 are not to be construed to limit the authority of the Commissioner of Internal Revenue under the provisions of Section 3220 of the Revised Statutes, as amended, to refund or pay back a tax illegally collected, the provisions of the acts are certainly not to be construed to in any way affect or limit the right of the petitioner to sue.*

The jurisdiction of the Court of Claims is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes, neither of which have been repealed or amended. As a prerequisite to the filing of his suit in the Court of Claims the petitioner duly filed with the Commissioner of Internal Revenue a claim for refund as provided by Section 3220 of the Revised Statutes and within the time prescribed by Section 3228 of the Revised Statutes. See *Rock Island, etc. R. Co.* v. *United States*, 54 Ct. Cl. 22, affirmed 254 U. S. 141, 41 S. Ct. 55. That Congress did not intend the provisions of Sections 607 and 611 to apply to the right of the petitioner to sue or to the jurisdiction of the court to entertain a suit clearly appears from the terms and provisions of the sections which can not be construed to have application to the courts.

Had Congress intended Section 611 to apply to defeat the

right of the petitioner to sue it would have provided as it did in Section 606 "* * * in any suit * * *" and in Section 284(d) of the Revenue Act of 1926 "* * * no suit * * * shall be instituted in any court * * *."

**Congress by using the same terms in Sections 607 and 611 adopted the construction given mandatory administrative provisions in prior acts:**

The rule of statutory construction that, where Congress enacts a statute and uses the same or similar terms and provisions that it had used in a prior statute which had received a uniform construction by the courts and by the departments the same interpretation is to be given the subsequent statute, has application to Sections 607 and 611 and they are to be construed to have the same meaning as the provisions of the prior revenue acts relating to overpayments, credits and refunds.

When Congress enacted the Revenue Act of 1928, it was aware of the fact that in the prior acts it had used the words "overpayment," "credited," and "refunded" to define the duties of the Commissioner of Internal Revenue. Congress was aware also of the construction which had uniformly been placed on the prior acts by the Treasury Department and by the courts, and the provisions of the Revenue Act of 1928 must, therefore, be construed with reference to the meaning given by Congress to the terms used in prior acts and the meaning given them in the construction of the prior acts by the Treasury Department and by the courts.

There is certainly no reason to suppose that for the first time in the Revenue Act of 1928, Congress made a clear departure from its legislative policy and intended the words "overpayment," "credited" and "refunded" to have an entirely different meaning from that given them in the prior acts or in the construction given prior acts. The rule of statutory construction that applies here is well stated in 36 Cyc. 1153 as follows:

> "Where a statute that has been construed by the courts has been reenacted in the same, or substantially the same terms, the legislature is presumed to have been familiar

> with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction. So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense, in the new statute as in the previous statute. These rules are also extended to statutes and parts of statutes that have been reenacted after having received a practical construction by the legislative or executive departments of the government."

The petitioner submits that, since Congress used the same terms it had used in prior acts to refer to matters of routine in the office of the Commissioner of Internal Revenue, the same construction must be given to Sections 607 and 611 of the subsequent act. Further, Congress in Section 322 of the Revenue Act of 1928, with reference to the tax for the year 1928, reenacted the provisions of Sections 252 and 272 of the prior acts.

**Sections 607 and 611 are substitutes for 1106(a) of the Revenue Act of 1926:**

The thing that Congress was concerned with in the enactment of these sections of the Revenue Act of 1928 was the *duty of the Commissioner of Internal Revenue* to make a refund of a tax collected after the limitation period. The provision in Section 1106(a) that no "credit or refund * * * shall be allowed unless the taxpayer has overpaid the tax" was construed by the Commissioner as a limitation on the authority that he otherwise would have had under the provisions of Section 3220 of the Revised Statutes, as then in force, to make such refund.

During the fall of 1927 the Commissioner of Internal Revenue issued a ruling I. T. 2382, C. B. VI-2—102 which reads:

> "Many inquiries are being received both from within and without the Bureau as to *the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of Bowers* v. *New York & Albany Lighterage Co.*

"Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the New York & Albany Lighterage Co. decision may have no application to cases where bonds were filed or where claims in abatement were filed, and that, in view of section 1106 of the Revenue Act of 1926, *the decision should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner.* Furthermore, section 1106 was not raised in the Albany Lighterage Co. case and was not considered in connection with the confession of error made by the Government in the Toxaway Mills case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the Albany Lighterage Co. decision to other cases in view of section 1106.

In view of the great uncertainty as to the whole matter, it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the Albany Lighterage Co. decision unless and until the situation is clarified by further court decisions or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation, and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

In order to clarify the *duty* and *authority* of the Commissioner of Internal Revenue and to instruct him what to do with amounts that had been paid him by taxpayers after the running of the statute, Congress repealed Section 1106(a) as of February 26, 1926, and enacted as a substitute for Section 1106(a) Sections 607, 611 and other related sections of the Revenue Act of 1928, and amended Section 3229 of the Revised Statutes, Act May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, entitled "An Act to discontinue certain reports now required by law to be made to Congress.

**Section 3226 of the Revised Statutes has not been repealed or amended:**

Congress has permitted Section 1113(a) of the Revenue Act

of 1926 (44 Stat. 116), Section 3226 of the Revised Statutes, to remain in force and without amendment. Section 1113(a) reads:

> "Section 3226 of the Revised Statutes, as amended, is re-enacted without change, as follows:
>
> "'SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been *erroneously or illegally assessed or collected*, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'"

By repealing Section 1106(a) and at the same time permitting Section 1113(a) to remain in full force and effect Congress meant in the enactment of Sections 607 and 611 and in the amendment to Section 3220 of the Revised Statutes to instruct the Commissioner of Internal Revenue to credit or refund overpayments and at the same time to leave in full force and effect the right of the petitioner to file a claim for and to sue to recover a tax illegally collected.

Had Congress intended to deprive the petitioner of the right to sue to recover a tax illegally collected from him after the expiration of the statutory period it would have amended Sections 3220 and 3226 of the Revised Statutes by including

therein provisions similar to those which appear in Section 611 of the Revenue Act of 1928.

It is the position of the petitioner that his right to sue the United States for the amount of the tax illegally collected from him is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and that the only limitations on the right to sue are those contained in Section 3226, which Congress has seen fit to permit to stand as enacted in the Revenue Act of 1926.

**The tax was not assessed within the period of limitation:**

The petitioner filed his return on February 27, 1917, and the three-year period for the discovery and assessment of the tax prescribed by Section 9(a) of the Revenue Act of 1916, expired February 7, 1920. The tax in question was not assessed until the month of October, 1921, which was after the expiration of the three-year period and was prior to the enactment of the Revenue Act of 1921, which was approved November 3, 1921.

In the court below the petitioner contended that Section 611 of the Revenue Act of 1928 did not apply because the tax was not "within the period of limitation properly applicable thereto, assessed." The court held that Section 250(d) of the Revenue Act of 1921 was retroactive to January 1, 1921, and that the tax was assessed within the five-year period prescribed therein.

In granting the writ this Court limited the questions to the effect and validity of Section 611 of the Revenue Act of 1928. Inasmuch as Section 611 applies only in the case of a tax "within the period of imitations properly applicable thereto, assessed," the question of the timely assessment of the tax is one involving the effect of section 611 and is, the petitioner submits, properly before this Court.

Section 250(d) of the Revenue Act of 1921 provides that the amount of "taxes due under any return made under this Act * * * for prior taxable years or under prior income, excess-profits or war-profits Acts, * * * shall be determined and assessed within five years after the return was filed, * * *."

The assessment was, however, not made under nor pursuant

to the provisions of Section 250(d) of the Revenue Act of 1921 but under and pursuant to the provisions of Section 9(a) of the Revenue Act of 1916, and was therefore not valid at the time made and the petitioner submits is not such assessment as Congress contemplated in Section 250(d) under the requirement that the tax "*shall be* determined and assessed within five years."

The requirement of Section 250(d) of the Revenue Act of 1921 is that the amount of any tax due under a return for the year 1916 "shall be determined and assessed within five years." The wording of the section discloses that Congress meant to refer to those things that "shall be" done for the determination and assessment of the tax and was speaking of future and not of past determinations and assessments. The section appears in Part III of the Act which is entitled "Administrative Provisions" and in which appear those provisions of the law which relate to the routine of determination, assessment and collection of the tax by the Commissioner of Internal Revenue, and are intended for his guidance in the future conduct and administration of his office. These administrative provisions do in no sense impose a tax for the year 1916, but merely define the administrative steps that the Commissioner shall take after the enactment of the 1921 Act for the determination and assessment for the tax for the year 1916.

**No legal claim in abatement was filed:**

If the Court holds that Section 250(d) of the Revenue Act of 1921 is retroactive to January 1, 1921, then the petitioner submits that the claim in abatement is illegal and does not meet the requirements of Section 611 of the Revenue Act of 1928. Section 250(d) provides that a taxpayer shall be given thirty days in which to protest a proposed assessment and further provides:

> "* * * Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter

> provided, and in such cases *no claim in abatement of the amount so assessed shall be entertained:* * * *"

**The collection of the tax was never stayed:**

The requirements of Section 611 are the assessment of the tax, the filing of the claim in abatement, "and if the collection of any part thereof was stayed, then, the payment of such part * * * shall not be considered an overpayment * * *." The section applies only in the case of stay and only to the extent of that part of the tax the collection of which "was stayed."

Congress has used the word "stayed" which is a word having a well defined and judicially settled legal meaning. The only meaning that the word can have is that the collector was stopped or prevented from collecting the tax. *United States* v. *Burden, Smith & Company*, 33 F. (2d) 229.

In addition to having a judicially settled legal meaning the word "stayed" is used in a taxing statute and its meaning is not to be extended by implication, for as this Court stated in *United States* v. *Merriam*, 263 U. S. 179, 44 S. Ct. 69:

> "* * * But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 S. Ct. 53."

This Court in *Kepner* v. *United States*, 195 U. S. 100, 24 S. Ct. 797, stated that the word "bequest" having a judicially settled meaning it must be presumed that it was used in that sense by Congress. The petitioner can see no reason why the word "stayed" should not be looked on in the same light by this Court and be held to be a word having a judicially settled meaning and to have been used by Congress in that sense. Congress used the word "stay" in its strictly legal sense in both the Revenue Acts of 1924 and 1926 and is to be presumed to have used the word in the same sense in the Revenue Act of 1928.

There are no other provisions of Section 611 or of other acts

of Congress which are to be looked to to change this well defined meaning of the word "stayed." It is true that in Section 611 the words "with or without bond" appear but they refer to and modify the claim in abatement and have no bearing whatever on the question of stay. At the time of the enactment of the section Congress was aware of the fact that in certain cases collectors had required bonds with claims in abatement and in others they had not. All that Congress intended to do was to refer to all claims in abatement. It did not intend the section to apply, however, in the absence of stay of collection of some part of the tax.

The court below held that the word "stayed" is to be construed to mean a mere delay which in turn means mere neglect on the part of the collector. The court below has virtually replaced the statute by the report of the Ways and Means Committee. See House Report No. 2, 70th Congress, First Session, page 34. The petitioner submits that the court below erred in construing Section 611 with reference to the report of the Committee for the section is clear on its face and its meaning must be determined therefrom and, further, Congress did not follow the report of the Committee for instead of providing for the application of the section to mere delay Congress provided that the section should have application only in case the collection of the tax was stayed.

In order that he collection of any part of the tax may have been stayed the petitioner submits that the stay must have existed as a matter of law, of contract or of estoppel.

The law at all times here under consideration made it the duty of the collector to proceed to collect the tax and the law permitted no stay. The law was the exact opposite of stay for it specifically required the collector to proceed to collect the tax. Further, Section 3224 of the Revised Statutes provided that the collection of the tax could not be enjoined.

Article 261 of Treasury Department Regulations 33 which was in force when the abatement claim was filed reads:

> "The filing of a claim for the abatement of a tax alleged to have been erroneously assessed *does not necessarily*

*operate as a suspension of the collection* of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax and leave the taxpayer to his remedy by claim on Form 46."

Article 1032 of Regulations 62 promulgated for the enforcement of the Revenue Act of 1921 reads in part:

> "* * * *The filing of a claim for abatement does not necessarily operate as a suspension of the collection* of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund. * * *"

*The court below made a special finding that the collection was held up in the discretion of the collector* (R. 10). The finding is not that the collection was stayed but that the collector acted within his own discretion in not collecting the tax. The collector merely failed to exercise the due diligence required by the regulations. See Regulations 12.

The collection was at no time stayed, stopped, suspended or even delayed as the result of the filing of the abatement claim. It was held up not because of the filing of the abatement claim but because of the exercise of the discretion by or the lack of diligence on the part of the collector.

The petitioner submits that the collection of no part of the tax was stayed or delayed by the filing of the claim in abatement or otherwise but that it was merely held up in the discretion of the Collector. This is not stay.

## POINT B.

## TO THE EXTENT THAT IT MAY BE CONSTRUED TO APPLY, SECTION 611 HAS BEEN REPEALED BY SECTION 3220 OF THE REVISED STATUTES, A LATER ACT.

Section 611 like Section 619(b) (45 Stat. 878) hereinafter mentioned appears in and as a part of Title IV of the "Rev-

enue Act of 1928," Act of May 29, 1928, c. 852, approved by the President at 8 A. M. of that day (Public—No. 562–70th Congress) (H. R. 1). Title IV consists of certain sections of the act which modify provisions of prior acts, primarily those of the Revenue Act of 1926.

By Section 1114 of the Revenue Act of 1926, Section 3220 of the Revised Statutes, as amended by Section 1011 of the Revenue Act of 1924, was amended by adding at the beginning "Except as otherwise provided by sections 284 and 319 of the Revenue Act of 1926." The reference to Section 284 has been explained and it is sufficient here to state that Section 319 relates to estate taxes. As mentioned above, Congress by 607, 611 and other related sections of the Revenue Act of 1928, modified the provisions of Section 284 of the Revenue Act of 1926. It therefore became necessary to amend Section 3220 of the Revised Statutes, Section 1111 of the Revenue Act of 1926, to change the reference to Section 284. Congress instead of providing "Except as otherwise provided by Section 284 * * * of the Revenue Act of 1926, as amended by Section 507 of the Revenue Act of 1928 and as modified by Sections 607 and 611 of the Revenue Act of 1928" chose simpler language to accomplish the same purpose and provided in Section 619 that:

> "(b) Section 3220 of the Revised Statutes, as amended by Section 1111 of the Revenue Act of 1926, is amended by striking out 'Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926' and inserting in lieu thereof 'Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes.'"

That Congress was concerned merely with the effect of Sections 607, 611 and 612 and with the duty of the Commissioner to credit or refund an overpayment appears from the facts that it placed Section 619 in Title IV along with the Sections 607, 611 and 612 and gave it the title "Minor Administrative Amendments."

*The purpose of Congress in the enactment of Section 619(b)* of the Revenue Act of 1928, was merely to clarify the duty of the

Commissioner of Internal Revenue which was made necessary by the modification of the provisions of Section 284 of the Revenue Act of 1926 by the provisions of Sections 607 and 611 of the Revenue Act of 1928. Section 619(b) is, therefore, not to be construed to in any manner defeat or affect the right of the petitioner to the refund of a tax illegally collected or to prosecute a suit against the United States in the Court of Claims under the provisions of Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

Section 619(b), together with the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, entitled "An Act to discontinue certain reports now required by law to be made to Congress," is carried into the United States Code, Supplement III, Title 26, Sec. 149, as an amendment to Section 3220 of the Revised Statutes.

"An Act to discontinue certain reports now required by law to be made to Congress" was passed by Congress subsequent to the passage of the Revenue Act of 1928, and was signed by the President on the same day, May 29, 1928 (Public No. 611—70th Congress) (H. R. 12064), but at a later hour than the Revenue Act of 1928. The petitioner submits that the codifiers erred in publishing the section of the Revised Statutes as having been amended by both Section 619(b) of the Revenue Act of 1928, and by Sec. 3, of the Act of May 29, 1928, c. 901, 45 Stat. 996. The two acts were not concurrently passed and Section 3220 of the Revised Statutes is to be considered as amended by the later act only. Section 3220 of the Revised Statutes should have been carried into the United States Code as amended and reenacted by the Act of May 29, 1928, Sec. 3, c. 901, 45 Stat. 996, as follows:

> "Sec. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:
>
> "'REFUNDMENTS: TAXES AND PENALTIES—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be

> unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section.' Approved, May 29, 1928."

Section 3220 of the Revised Statutes, as amended by the Act of May 29, 1928, c. 901, refers to regulations prescribed by the Secretary of the Treasury. Section 3220, as amended by the several acts prior to the Revenue Act of 1928, has been printed in full in the regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury for the enforcement of the acts. Article 1031 of Regulations 45; Article 1031 of Regulations 62; Article 1031 of Regulations 65; and Article 1301 of Regulations 69. There is, however, in Regulations 74, promulgated for the enforcement of the Revenue Act of 1928, no reference to Section 3220 of the Revised Statutes, except that Section 619 of the Revenue Act of 1928 is printed. Regulations 74 do not prescribe the manner under which the Commissioner "is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected." Section 3220 as amended by the Act of May 29, 1928, c. 901, is not mentioned in Regulations 74. The most recent regulation with reference to the authority of the Commissioner to pay back taxes illegally collected is that in Article 1301 of Regulations 69 which reads:

> "* * * General authority for the remitting or refunding of taxes erroneously or illegally assessed or collected is found in section 3220 of the Revised Statutes * * *."

The petitioner submits that if, on reading Sections 252 of the Revenue Acts of 1918 and 1921, Sections 272 and 281 of the Revenue Act of 1924, Sections 272, 284 and 1106(a) of the Revenue Act of 1926, and Sections 1, 322, 607, 611 and 619, there should arise in the mind of the Court any doubt that the provisions of the sections constitute merely mandatory instructions to the Commissioner of Internal Revenue to credit or refund overpayments and do not in any manner affect the authority of the Commissioner to refund or the right of the taxpayer to recover a tax "erroneously or illegally assessed or collected," this doubt should be entirely dispelled by the provisions of Section 3220 of the Revised Statutes, a later act of Congress, which must be read to mean that any possible inconsistent provisions of prior acts are repealed and superseded. If the provisions of Section 611 are inconsistent with those of Section 3220 of the Revised Statutes they stand repealed by the later act.

## POINT C.

## SECTION 611, IF NOT REPEALED AND IF TO BE CONSTRUED TO APPLY WOULD BE UNCONSTITUTIONAL.

It is the position of the petitioner that on the expiration of the five-year period for collection prescribed by Section 250(d) of the Revenue Act of 1921 that his liability for the tax was extinguished; that the subsequent collection of the amount of the tax from him by the collector was illegal and did not transfer title thereto to the United States, but that title remained in the petitioner and the amount paid remained his property; and that, if construed to deprive the petitioner of his right and title to the amount so paid or of his right to sue for its recovery Section 611 would violate the Fifth Amendment to the Constitution.

### The expiration of the five-year period in Section 250(d) of the Revenue Act of 1921 extinguished the liability for the tax.

Section 250(d) of the Revenue Act of 1921 (c. 136, 44 Stat. 227, 265), reads in part:

> "The amount of income, excess-profits, or war-profits taxes due under any return * * * shall be determined and assessed within five years after the return was filed, * * * and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed. * * *."

While Section 250 (d) does provide that no suit or proceeding for the collection of the tax shall be begun after the five-year period, it is, however, in the case of a tax assessed prior to June 2, 1924, within the power of the collector to proceed to collect the tax and to distrain if necessary, because Section 3224 of the Revised Statutes prohibits injunction. We are here concerned with a tax assessed prior to the creation of the Board of Tax Appeals and with the system for collection then in force. To this case the provisions of Section 274(a) of the Revenue Act of 1926 (44 Stat. 55), that notwithstanding the provisions of Section 3224 of the Revised Statutes the collection of the tax may be enjoined, do not apply.

In order to fully understand the effect of the provisions of Section 250(d) of the Revenue Act of 1921, it is necessary to consider with it and as a part of the same statutory system for the collecting and refunding of taxes, Sections 3186 to 3209 of the Revised Statutes relating to distraint and other steps to be taken for the collection of a tax, Section 3224 of the Revised Statutes which provides that collection can not be enjoined and Sections 3220 and 3226 which recognize the illegality of the collection of a tax after the expiration of the five-year period provided in Section 250(d) and confer on the taxpayer the right to recover the amount of the tax so collected. These statutes provide a period of five years from the filing of the return for the collection of a tax and provide further that the collection after such period can not be enjoined, but on payment may be recovered by the taxpayer as a tax illegally collected. Section 250(d) of the Revenue Act of 1921, is but a part of the system provided by Congress for the collecting and refunding of internal-revenue taxes.

That Section 250(d), Section 3224 and Sections 3220 and 3226 and other related sections of the Revised Statutes are to be

read together as constituting a single system of corrective justice for the collecting and refunding of taxes has been held by this Court. Chief Justice Taft in *Graham* v. *Dupont*, 262 U. S. 234, 43 S. Ct. 567, very clearly stated this principle in the following language.

> "Section 3224, Revised Statutes (Comp. St. Par. 5947), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In Cheatham *v.* United States, 92 U. S. 85, 88, 23 L. Ed. 561; State Railroad Taxes, 92 U. S. 575, 613, 23 L. Ed. 663, and in Snyder *v.* Marks, 109 U. S. 189, 193, 3 Sup. Ct. 157, 27 L. Ed. 901, it was said that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of *stringent measures not judicial*, to collect them, *with appeals to specified tribunals and suits to recover back moneys illegally exacted*, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares by paragraph 3224 that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assessment and claim that it is valid.
>
> * * * It is certain that by the amendments to section 252 and section 3226, Revised Statutes, by the Act of March 4, 1923 (Public No. 527), the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise the questions * * * as to the bar of time against the assessment which he attempted to raise in the bill."

The system of corrective justice that Congress has set up, in the case of a tax assessed prior to June 2, 1924, must be construed to mean that the expiration of the period for limitation extinguishes the liability but that the amount of the tax can thereafter be illegally collected with the right remaining of the taxpayer to recover it. That such is the intent of Congress clearly appears in Section 1106(a) of the Revenue Act of

1926, which the petitioner submits is declaratory of Section 250(d) of the Revenue Act of 1921.

The provisions of Section 250(d) of the Revenue Act of 1921 do not provide an ordinary statute of limitations and the doctrine stated in *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, does not apply, for the expiration of the five-year period for collection defined in the section does not affect the remedy of the collector to make collection but extinguishes the liability for the tax.

This Court has in a number of cases distinguished ordinary statutes of limitations pertaining to remedies only from those which pertain to rights and liabilities. In *Central Vermont Ry.* v. *White*, 238 U. S. 507, this Court stated:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy * * * depend upon the law of the place where the suit is brought. McNeil v. Holbrook, 12 Pet., 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. *But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability.*"

In *United States* v. *John Barth Co., et al.*, 27 F. (2d) 782, reversed on other grounds, 279 U. S. 370, 49 S. Ct. 366, the question whether Section 250(d) is an ordinary statutue affecting the remedy only or one affecting the right came before the Circuit Court of Appeals for the Seventh Circuit and in the course of the opinion the court stated:

> "In general, it may be said that statutes of limitation bar only the remedy. But the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes culminating in the Act of 1926, indicate an intent not merely to bar the remedy but to extinguish entirely all liability for the tax, where its determination and assessment is not made within five years after filing the return."

The decisions of this Court in *Graham* v. *Dupont, supra; Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, 47 S. Ct. 389, and *Russell* v. *United States*, 278 U. S. 181, 49 S. Ct. 121, support the position of the petitioner that the expiration of the five-year period in Section 250(d) extinguishes the liability. In the *Russell* case Mr. Justice McReynolds stated:

> "Manifestly, but for section 278 (Revenue Act of 1924), petitioners would be free from liability under the five-year limitation in the act of 1918, continued by the act of 1921. If section 278 refers only to assessments made after June 2, 1924, petitioners are not liable.
>
> "If an assessment made before that date comes within the ambit of section 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired."

In several cases in the lower courts in which Section 611 of the Revenue Act of 1928 has been under consideration, it has been held that the provisions of Section 250(d) of the Revenue Act of 1921 affect the remedy only. The petitioner submits that the conclusions of these courts have been reached without careful consideration of the provisions of Section 250(d) and of the provisions of Section 3224 of the Revised Statutes which forbids an injunction of the illegal collection of a tax and Sections 3220 and 3226 which confer on the taxpayer the right to recover the amount so illegally collected. The petitioner further submits that the courts below did not follow the decisions of this court in *Graham* v. *Dupont, supra; Bowers* v. *New York & Albany Lighterage Co., supra, and Russell* v. *United States, supra.*

The Court of Claims in a recent case, *Mascot Oil Company* v. *United States*, decided June 2, 1930, 42 F. (2d) 309, writ granted, No. 400, held as a matter of law that "the liability for the tax still existed" after the expiration of the five-year period for collection defined in Section 250(d) of the Revenue Act of 1921. It is to be noted that the court held that the thing that still

existed is "the liability for the tax" and not the duty of the taxpayer to pay the amount of the tax after the running of the statute with the right to recover it, but the liability of the taxpayer for the tax and the right and title of the United States thereto. The effect of the decision of the court below is that Section 250(d) is meaningless and that the amount of the tax collected from the taxpayer is by right and title the property of the United States. This conclusion the petitioner submits is entirely erroneous.

While the court in the *Mascot Oil* case made no mention of any prior decision, it actually followed and applied the principle that it had laid down in *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, reversed 273 U. S. 781, 47 S. Ct. 471, that a tax paid after the bar of the statute can not be recovered from the United States. In the *Toxaway Mills* case the court stated:

> "* * * The plaintiff's contention that the act furnishes a right to recover all taxes collected after the expiration of five years from the date of the taxpayer's return presents a theory that manifestly can not be sustained *unless it be held that the limitation prescribed by the act of 1921 operated not alone upon the remedy but also upon the right* of the Government to collect and hold additional taxes after the end of the statutory limitation, even though such additional taxes were proper liabilities of plaintiff before that time. The general rule unquestionably is that the statute of limitations operates only to bar the remedy and does not extinguish the right."

The Court of Claims misconstrued Section 250(d) of the Revenue Act of 1921 and gave no consideration whatever to the provisions of Section 3224 and Sections 3220 and 3226 of the Revised Statutes. The effect of the decision in the *Toxaway Mills* case is to hold that Section 250(d) of the Revenue Act of 1921 is meaningless and at the same time to defeat the clearly expressed intent of Congress appearing in Sections 3220 and 3226 that a tax paid after the bar of the statute of limitations could be recovered as a tax *illegally collected*.

The decision of the Court of Claims in *Toxaway Mills* v. *United States*, *supra*, was reversed on confession of error, 273

U. S. 781, 47 S. Ct. 471, by the Solicitor General and should not have been followed by the Court of Claims in the case of *Mascot Oil* v. *United States, supra*, nor should it have been followed in this case.

The petitioner submits that the provisions of Section 250(d) of the Revenue Act of 1921 do not provide an ordinary statute of limitations affecting the remedy of the collector, for the collector can still proceed to collect and can distrain if necessary. The collector's remedy is full and complete and unaffected by the running of the statute. *If Section 250(d) does not affect the remedy of the collector, then it must extinguish the liability for the tax and give rise to a right in the taxpayer, to thereafter pay the amount of the tax and to sue to recover it, for otherwise it would be meaningless just as the Court of Claims held in the case of Toxaway Mills* v. *United States, supra.* That the expiration of the statute extinguishes the liability has been fully recognized by Congress in Sections 3220 and 3226, which are to be construed to mean that the collection of a tax after the bar of the statute is *illegal.*

**Section 1106(a) of the Revenue Act of 1926 is declaratory of Section 250(d) of the Revenue Act of 1921:**

Following the decision of the Court of Claims in *Toxaway Mills* v. *United States, supra*, and to prevent such decision from becoming a precedent for the interpretation of Section 250(d) of the Revenue Act of 1921 and of the limitation periods in other acts, Congress enacted Section 1106(a) of the Revenue Act of 1926 which reads in part:

> "The bar of the statute * * * shall not only operate to bar the remedy but shall extinguish the liability; * * *"

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (House Report No. 356, p. 55, 69th Congress, First Session) as follows:

> "AMENDMENT No 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the

remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills *v.* United States, although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft C. J., in Graham *v.* Dupont, 262 U. S. 234, 256, 258)."

It is to be noted that Section 1106(a) is in itself not a statute of limitations but it merely refers to and defines the bar of the statute of limitations in Section 250(d) of the Revenue Act of 1921 or other applicable statute of limitations. The section does not of itself extinguish the liability for the tax but merely declares that the bar of the statute of limitations in Section 250(d) shall extinguish it. Congress referred to no particular statute of limitation and very clearly intended Section 1106(a) to refer to all statutes of limitations against the United States and to the bar of all such statutes. The petitioner submits that Section 1106(a) should be construed to apply to the bar of the statute of limitations in this case and to declare that the petitioner's liability is extinguished because of the running of the statute of limitations under Section 250(d) of the Revenue Act of 1921.

The only word in Section 1106(a), that can be used as the basis of an argument that the section should be given a prospective application only, is the word "shall." The word is, however, not used to denote time or tense but merely to give the section application to the bar of the statute of limitations as provided in other revenue acts. Congress simply declared that the expiration of the five-year period for collection in Section 250(d) shall extinguish the liability for the tax. Its legislative history mentioned above clearly shows that Congress intended the section to be merely declaratory legislation and that it should have retrospective application and be read and considered a part of Section 250(d) of the Revenue Act of 1921.

By Section 278(d) of the Revenue Act of 1924, Congress provided a limitation period of six years for the collection of any tax assessed after June 2, 1924. At the time of the enact-

ment of the Revenue Act of 1926, Congress was, therefore, not concerned with the period of limitations for the collection of a tax assessed after June 2, 1924. Congress was concerned merely with the collection of a tax assessed prior to June 2, 1924, the limitation period for which is that prescribed in Section 250(d) of the Revenue Act of 1921, which had in a great number of cases and in this case already expired.

Section 1106(a) must be construed to be retroactive or be construed to be meaningless except in rare instances. The Court's attention is further called to the fact that in the Revenue Act of 1926, and in Section 906(e) Congress conferred jurisdiction on the Board of Tax Appeals to determine whether or not the assessment or collection of a tax was barred by the statute of limitations *and for the first time gave the taxpayer the right to appear and plead the statute of limitations prior to payment.*

The petitioner submits that his liability for the amount of the tax was extinguished by the expiration of the statutory period in Section 250(d) of the Revenue Act of 1921 as defined by Section 1106(a) of the Revenue Act of 1926, and that it was beyond the power of Congress to in any manner revive such liability by the enactment of Section 611 of the Revenue Act of 1928, or by the repeal of Section 1106(a) by Section 612 of the Revenue Act of 1928.

**The amount of the tax was illegally collected and title thereto remained in the petitioner:**

In Sections 3220 and 3226 of the Revised Statutes, as mentioned above, Congress has clearly recognized that the collection of the amount of a tax after the period of the statute of limitations is illegal. These sections refer to a tax "illegally" collected, or in the words of Chief Justice Taft in *Graham* v. *Dupont, supra,* to "moneys illegally exacted."

The petitioner submits that the United States did not acquire the right or title to the amount of the tax so illegally collected and that therefore the amount is the property of the petitioner and the United States holds it for him merely as trustee. The

United States can not acquire title to a fund by the illegal act of a collector.

In *Christie-Street Commission Co.* v. *United States*, 136 Fed. 326, which was an action brought for the recovery of an internal-revenue tax illegally collected, counsel for the United States argued that the action was one for wrongfully exacting from the plaintiff moneys which it was not legally required to pay, in violation of the general rule which forbids the taking of property without compensation and that it was an action sounding in tort of which the court had no jurisdiction because not founded on a law of Congress. In the course of his opinion Judge Sanborn of the Circuit Court of Appeals for the Eighth Circuit clearly recognized that the plaintiff's *property was taken without "claim or color of title*, because the law implies a contract to return it or pay its value," citing *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 5 S. Ct. 306, and *United States* v. *Lynah*, 188 U. S. 445, 23 S. Ct. 349. Judge Sanborn reviewed the decisions of this Court in the cases of *Nichols* v. *United States*, 7 Wall. 122, 19 L. Ed. 125, *United States* v. *Kaufman*, 96 U. S. 567, 24 L. Ed. 792, *United States* v. *Savings Bank*, 104 U. S. 728, 26 L. Ed. 908, and *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 24 S. Ct. 376, and stated:

> "* * * In each case the United States exacted moneys without right, and in violation of the general rule that the property of the citizen may not be taken without legal authority. In each case the taking was tortious."

The *Christie-Street Commission Co.* case, *supra*, was followed by the District Court in *Emery, Bird, Thayer Realty Co.* v. *United States*, 198 Fed. 242, affirmed 247 U. S. 28, 35 S. Ct. 499.

In *Atchison, Topeka, & Sante Fe Railway Company* v. *O'Connor*, 223 U. S. 280, 32 S. Ct. 216, this Court held that the amount of a tax illegally collected and retained by an official of a State was held subject to the paramount claim of the taxpayer.

**Section 611 does not impose a tax but merely authorizes the retention of the amount of the tax illegally taken from the petitioner:**

If Section 611 is not to be construed as merely administrative and as a limitation on the duty imposed on the Commissioner of Internal Revenue by Section 607 but is to be construed to apply to the right of the petitioner to recover by suit, then it is to be read to mean, in the words of the Ways and Means Committee, that it "authorizes the retention" of the amount of the tax illegally taken from the petitioner in the first instance and that Congress has receded from the promise made in Sections 3220 and 3226 of the Revised Statutes, as amended by the Revenue Act of 1926, to return to the petitioner the amount so collected.

Congress has not enacted a taxing statute retroactively as was considered by this Court in *United States* v. *Heinszen & Company*, 206 U. S. 370, and in *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, in which it was held that the right to prosecute a suit to recover a tax fell with the subsequent enactment of a statute which made the tax legal, which subsequent legislation was within the power of Congress and did not violate any provision of the Constitution. *All that this Court decided in those cases is that Congress could enact a taxing statute retroactively.* A taxpayer has no vested right not to be taxed under a statute which complies with the Sixteenth Amendment to the Constitution and a taxpayer has no right to complain that the statute was passed retroactively. The principle of the *Heinszen* and *Rafferty* cases, *supra*, does, however, not apply in this case, for the reason that Congress, in the enactment of Section 611 did not levy a tax in the exercise of its powers under the Sixteenth Amendment to the Constitution, but simply attempted to retain the amount of the tax illegally taken from the petitioner. The present case falls within the decisions in *Lincoln* v. *United States*, 202 U. S. 484; and *Forbes Pioneer Boat Line* v. *Board of Commissioners, etc.*, 258 U. S. 338. In the latter case Mr. Justice Holmes stated:

"The argument that prevailed below was based on the supposed analogy of United States *v.* Heinszen & Co., 206 U. S. 370; (Rafferty *v.* Smith, Bell & Co., 257 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time the enactment would have been within its power. Wagner *v.* Leser, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. * * *" .

**Section 611 does not merely withdraw the defense of the statute of limitations:**

In the report of the Committee on Ways and Means, 70th Congress, First Session, House Report No. 2, the Committee referred to the proposed legislation in Section 611 as an Act which "merely withdraws the defense of the statute of limitations." The petitioner submits that the Committee misunderstood the statutes of limitation in the prior acts for, prior to the enactment of Sections 274(a) and 906(e) of the Revenue Act of 1926, a taxpayer had no defense to the statute of limitations because, as mentioned above, Sections 3224 of the Revised Statutes prohibited a taxpayer from raising any defense whatever to the collection of a tax even after the bar of the statute of limitations.

**Section 611 does not withdraw the consent of the United States to be sued:**

Congress has by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes given the consent of the United States to be sued by the petitioner in the Court of Claims and the petitioner submits that the consent so given has not been withdrawn by Congress in the enactment of

Section 611. The question here involved is not the right of Congress to withdraw the consent of the United States to be sued but the right of Congress to retain the property of the petitioner contrary to the provisions of the Fifth Amendment to the Constitution.

**Conclusion.**

The petitioner submits that Section 611 of the Revenue Act of 1928 is merely an exception or limitation to Section 607 and that its provisions have no application because the petitioner filed his claim for refund under Section 3220 of the Revised Statutes and his suit under Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and not under Section 607; that Section 607 and 611 are merely mandatory administrative provisions which apply to the Commissioner of Internal Revenue only and direct him to credit or refund an overpayment under certain conditions; that Congress has used terms and made provisions which can not be construed to apply to the right of the petitioner to sue; that Congress has used the same terms that it used in prior acts to refer to the credit or refund of an overpayment which can be made by the Commissioner of Internal Revenue only; that Sections 607 and 611 merely provide a substitute for Section 1106(a) of the Revenue Act of 1926; that Congress has neither repealed nor amended Section 145 of the Judicial Code nor Section 3226 of the Revised Statutes; and that the provisions of Section 611 do, therefore, not apply. Further, the provisions of the section do not apply to this case because no internal-revenue tax was assessed "within the period of limitation properly applicable thereto," no legal claim in abatement was filed and the collection of no part of the tax was stayed.

The petitioner submits that, to the extent that it may be construed to limit the authority of the Commissioner of Internal Revenue to remit or pay back the amount of the tax illegally collected from him or to in any wise affect his right to its recovery, Section 611 has been repealed and superseded by

the later act of Congress in Section 3220 of the Revised Statutes, as amended, by Act of May 29, 1928, c. 901 (45 Stat. 996).

The petitioner further submits that, if construed to apply to take from the petitioner his right and title to the amount illegally collected from him as a tax after the expiration of the statutory period for collection, Section 611 would violate the provisions of the Fifth Amendment to the Constitution, for on the expiration of the five-year period prescribed by Section 250(d) of the Revenue Act of 1921 the petitioner's liability for the tax was satisfied and extinguished, the amount of the tax was thereafter illegally collected and the right and title thereto remained in the petitioner and did not pass to the United States.

Respectfully submitted,

THEODORE B. BENSON,
*Attorney for Petitioner.*

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Clerk

# Supreme Court of the United States.

OCTOBER TERM, 1930.

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## No. 65

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PERCIVAL E. MAGEE, PETITIONER,

*v.*

THE UNITED STATES, RESPONDENT.

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## Reply Brief for Petitioner.

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(35,322)

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# Supreme Court of the United States.

OCTOBER TERM, 1930.

**No. 65**

PERCIVAL E. MAGEE, PETITIONER,

*v.*

THE UNITED STATES, RESPONDENT.

## REPLY BRIEF FOR PETITIONER.

### STATEMENT.

This reply brief is addressed to the argument of the respondent that Section 611 of the Revenue Act of 1928 was not repealed by the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 986, 996. The argument that Section 611 has not been repealed appears at pages 10 to 15 of respondent's brief.

### ARGUMENT.

At page 12 of the respondent's brief it is frankly stated the Government is contending that Section 611 of the Revenue Act of 1928 is a limitation on the authority vested in the Commissioner of Internal Revenue by Section 3220 of the Revised Statutes, to remit, refund and pay back taxes erroneously or illegally assessed or collected as well as a limitation on the authority of the Commissioner of Internal Revenue to credit an overpayment or to refund any remaining balance under Section 252 of the Revenue Acts of 1918 and 1921 and Sections 272 and 281 of the Revenue Act of 1924 and Sections 272 and 284 of the Revenue Act of 1926.

In order to maintain its position in these Section 611 cases the respondent must convince the Court that the authority of the Commissioner of Internal Revenue under Section 3220 of the Revised Statutes to remit, refund and pay back a tax illegally collected is limited by the provisions of Section 611 of the Revenue Act of 1928. The respondent contends that Section 611 is a limitation on the authority of the Commissioner of Internal Revenue to remit and pay back a tax illegally collected after the expiration of the statute of limitations and starting from this basis the respondent proceeds to further argue that Section 611 is to be extended to be a limitation on the authority of the petitioner to sue for the recovery of the amount so illegally collected. The petitioner submits that this argument is not supported by reason or authority and is contrary to the clear intent of Congress which appears in Sections 607, 611 and 619(b) of the Revenue Act of 1928 and in Sections 3220 and 3226 of the Revised Statutes.

It is the position of the petitioner that Section 611 is merely a modification of the provisions of prior revenue acts relating to the auditing of returns and the crediting of overpayments or the refunding of any remaining balances and was never intended to be a limitation on the authority of the Commissioner of Internal Revenue to remit, refund and pay back a tax illegally collected. It is further the position of the petitioner that in so far as Section 611 might otherwise be construed to have the effect for which the respondent contends that it has been repealed. See original brief, page 20, and petitioner's brief in *Mascot Oil Company* v. *United States*, No. 400, at page 38.

The position of the petitioner with reference to the reenactment of Section 3220 of the Revised Statutes and to the repeal of the provisions of the Revenue Act of 1928 is that Section 619(b) of the revenue act has been repealed in its entirety and to the extent that it might be construed to conflict with the provisions of Section 3220 of the Revised Statutes, as later enacted, Section 611 of the Revenue Act of 1928 has been repealed and superseded. The petitioner does not contend that Section 611 has been repealed in its entirety, for it still stands for the guidance of the Commissioner of Internal

Revenue in the making of credits of overpayments, but that it has no application whatever to limit the authority of the Commissioner to remit or pay back a tax illegally collected.

**The Act of May 29, 1928, c. 901, Sec. 3, is a later enactment than Section 611 of the Revenue Act of 1928:**

In Section 1 of the Revenue Act of 1928 it is provided that the provisions of prior acts "shall remain subject to the applicable provisions of prior Revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by *legislation enacted subsequent to this Act.*"

Congress has here provided that Section 611, which is in Title IV, shall give way to subsequent legislation. Congress has carefully limited the application of Section 611.

In the Government's brief in the case of *Graham & Foster* v. *Goodcell*, No. 36, at page 28, reference is made to the Act of May 29, 1928, c. 901, Sec. 3, by which Section 3220 of the Revised Statutes was amended and reenacted, as a later enactment. The statement in the brief is:

> "The later change in Section 3220 by the Act of May 29, 1928, c 901, 45 Stat. 986, 996 (U. S. C. Sup. III, Title 26, Section 149), does not modify the effect of Section 619 so far as construing the purpose of Section 611 is concerned. The general effect of this later amendment of Section 3220 is discussed in the Government's brief in *Magee* v. *United* States, No. 65, present term."

It is to be noted that in its brief in that case, the Government admits that Section 3220 of the Revised Statutes is a later act but contends that it does not modify the effect of Section 619 in so far as construing the purpose of Section 611 is concerned. In its brief in this case, at page 13, the Government states that it does not appear that the Act of May 29, 1928, c. 901, Sec. 3, is a later enactment and further the Government refers to the fact that the Statutes at Large do not show the hour of the day on which the Act was approved by the President.

The Revenue Act of 1928 was approved at 8 A. M. on May 29, 1928. An examination of the Congressional Record dis-

closes that the Act of May 29, 1928, c. 901, Sec. 3, was not passed by Congress until some time during the afternoon of that day and between the hours of 1.30 and 5.30 P. M. The Act of May 29, 1928, c. 901, Sec. 3, was passed by Congress as H. R. 12064 and was approved by the President as Public Document No. 611. The Revenue Act of 1928 was passed as H. R. No. 1 and approved by the President as Public Document No. 562. The Congressional Record, Vol. 69, Part 10, at page 10515 discloses that the Senate of the United States on the day of May 29, 1928, recessed from 1.20 P. M. to 1.30 P. M. and was in continuous session thereafter until 5.30 P. M. The Congressional Record, Vol. 69, Part 10, at pages 10613 and 10615 discloses that H. R. 12064 was debated and passed by the Senate at some time later than 1.30 P. M. of that day. The Congressional Record, Vol. 69, Part 10, at pages 10680 and 10749 discloses that the bill was passed by the House following a recess which expired at 12 o'clock noon of that day. The Record, at pages 10887 and 10888 discloses that H. R. 12064 was approved by the President during the afternoon of that day and this appears to have been done just prior to adjournment. The petitioner therefore submits that the position of the Government that it does not appear that Section 3220 of the Revised Statutes was amended and reenacted subsequent to 8.00 A. M. on May 29, 1928, is not correct. The Congressional Record clearly discloses that the bill was passed by the Senate and approved by the President at some hour subsequent to 1.30 P. M. of that day. The Act of May 29, 1928, c. 901, Sec. 3, is the later enactment.

In the Government's brief it is further stated that the Revenue Act of 1928, and the Act of May 29, 1928, c. 901, Sec. 3, were approved by the President on the same day and the contention is made that they should be construed together as one enactment and in support of this *Lapeyre* v. *United States*, 17 Wall. 191, is cited to the effect that the hour of the approval of a statute will not be considered. The Government also cites the case of *Burgess* v. *Salmon*, 97 U. S. 381. On examining the latter case it is found that the statement in the case of *Lapeyre* v. *United States*, *supra*, that the hour of the day

should not be considered, is qualified and distinguished. During the course of the opinion this Court stated:

> "In *Lapeyre* v. *United States* (17 Wall. 191), it was said obiter, 'The act became effectual upon the day of its date. In some cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible.' The question involved in that case was whether a proclamation issued by President Johnson, bearing date of June 24, 1865, removing certain restrictions upon commercial intercourse, took effect on that day, or whether it took effect on the day it was published and promulgated, which was on the 27th of the same month. It was held by a majority of this court that it took effect from its date. The question was upon the 24th or 27th of June, and the point of the portion of a day was not involved. While the general proposition may be true, that where no special circumstances exist, the entire day on which the act was passed may be included, there is nothing in that case to make it an authority on the point before us."

The question here involved is not the time of taking effect of the statute in the sense of determining the beginning of its force and effect, but we are concerned with the repeal of a prior act by a subsequent one and a determination of what is the latest expression of Congress. The passage of a later act is an expression of a later intent which must prevail. It is "legislation enacted subsequent to this Act" within the terms of Section 1 of the Revenue Act of 1928.

Congress was apparently aware of the fact that by the enactment of Section 619(b) it had complicated the administration of the tax laws and had placed a collector in the awkward position of being liable for a judgment against him personally which the Commissioner of Internal Revenue was prohibited from repaying. Under the circumstances it was necessary for Congress to repeal Section 619(b) and to re-enact Section 3220 of the Revised Statutes to give the Commissioner of Internal Revenue full and complete authority to repay a collector the amount of a judgment rendered against him with or without a certificate of probable cause.

**The repeal of Section 611 is not merely by implication:**

In the brief for the respondent it is contended that repeals by implication are not favored. This is of course a general rule of statutory construction which the petitioner does not controvert, but the petitioner submits that it has no application here. The intent of Congress is so clearly apparent that nothing is left to implication. The structure of Title IV of the Revenue Act of 1928 shows clearly beyond any implication that Congress felt that it was necessary to add Section 619(b) in order to make Section 611 a possible limitation on Section 3220 of the Revised Statutes, as the respondent contends, and when Congress in a later act repealed Section 619(b) by reenacting Section 3220 of the Revised Statutes and omitting the change made by Section 619(b) and further by expressly providing in the title of Section 3220 that the section "as amended, is amended" it can not be said to have repealed Sections 619(b) and 611 merely by implication. There is an irreconcilable conflict between Sections 611 and 619(b) as the respondent contends they should be construed, and Section 3220 of the Revised Statutes as later amended, because the same act or course of conduct can not be both lawful and unlawful at the same place and time and under the same circumstances. In *Ellis* v. *Page*, Pick. 45 (Mass.) it is stated:

> "It is a well-settled rule that when any statute is revised, or one act framed from another, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. We are not, therefore, at liberty to suppose that the proviso or exception was omitted by mistake.
>
> "The rule is thus laid down in Smith's Commentaries on Statutory Construction, Section 785: "Where some parts of a revised statute are omitted in the revising act, the parts omitted are not to be deemed as revived by construction, but are to be considered as annulled." And again, Section 786, *id.*: "A subsequent statute, revising the whole subject-matter of a former one, and evidently

> intended as a substitute for it, although it contains no express words to that effect, must, on principles of law as well as on reason and common sense, operate to repeal the former."

In *United States* v. *Tynen*, 11 Wall. 88, 92, it is stated:

> "* * * When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

In *Breitung* v. *Lindauer*, 37 Mich. 217, the Supreme Court of Michigan stated:

> "The rule is that the later act operates to the extent of the repugnancy, as a repeal of the first act, or, if the two acts are not in express terms repugnant, yet if the latter covers the whole subject of the first, and contains new provisions showing that it was intended as a substitute, it will operate as a repeal."

See also *Porter* v. *Edwards*, 114 Mich. 640 and *Graham* v. *Muskegon County Clerk*, 116 Mich. 571.

In these several enactments Congress left nothing to implication. The reenactment of a statute by express reference to it as "amended" and by stating that it "is amended" and by further omitting parts of the amended statute, is not an amendment merely by implication.

What Congress intended to do in the reenactment of Section 3220 of the Revised Statutes and what it has in fact done is to place Section 3220 on the statute books free from any possible limitations that it had previously placed on it by Section 611 and Section 619(b) of the Revenue Act of 1928. Nothing is open to argument here for the simple reason that

the latest Act of Congress speaks for itself and speaks clearly and positively. This Court can not ignore the latest expression of Congress in the Act of May 29, 1928, c. 901, Sec. 3.

**The rule of construction that special prevails over general legislation does not apply here:**

The respondent takes the position that Section 3220 of the Revised Statutes is general legislation while Section 611 of the Revenue Act of 1928 is special and that the rule that special legislation prevails over general has application here. This position of the respondent the petitioner submits is in direct conflict with the position that it has taken on other points in this case. At page 12 of the brief respondent states:

> "We are contending in this group of cases that Section 611 was likewise a limitation on the authority given the Commissioner by Section 3220."

In taking the position that Section 611 is a limitation on the authority of the Commissioner under Section 3220 of the Revised Statutes, the respondent means that the two sections refer to the same subject matter, the refund of taxes. The respondent should not, in one part of its brief contend that the two sections refer to the same subject matter and then on the other hand contend that the one is general legislation and the other is special. If the respondent is correct that Section 611 is to be construed to refer to the authority of the Commissioner of Internal Revenue to remit or pay back a tax illegally collected, then the section relates to the same subject matter and the latter prevails over the former.

The rule of statutory construction that a general statute must give way to one which is special is merely one of the rules of construction that the courts resort to in order to determine an intent of Congress which does not otherwise clearly appear.

In the present case the intent of Congress in the reenactment of Section 3220 of the Revised Statutes clearly appears and it is perfectly obvious that it intended Section 3220 to have full and complete force and operation and that Sections 619(b)

and 611 of the Revenue Act of 1928, should give way thereto, otherwise it would not have referred to Section 3220 of the Revised Statutes "as amended," meaning of course as amended by Section 619(b), and, to the extent that it may be construed to apply, by Section 611 of the Revenue Act of 1928. In the reenactment of Section 3220 of the Revised Statutes, Congress clearly appears to have been fully aware of the enactment of Section 619(b) and Section 611 of the Revenue Act of 1928, which are embraced in the reference to Section 3220 of the Revised Statutes, "as amended."

The decisions cited by the respondent that a later general provision does not repeal a special provision in a prior act do not support its position.

## CONCLUSION.

To the extent that they might otherwise be construed to apply retroactively to limit the authority of the Commissioner of Internal Revenue to remit or pay back the amount of the tax illegally collected or to in any wise effect the right of the petitioner to its recovery, Section 611 and Section 619(b) have been repealed and superseded by the later Act of Congress in Section 3220 of the Revised Statutes, as amended by Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996.

Respectfully submitted,

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*Of Counsel:*
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CHARLES ELMORE

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No. ~~764~~ 65

# In the Supreme Court of the United States

OCTOBER TERM, 1929

PERCIVAL E. MAGEE, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**MEMORANDUM FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 761

PERCIVAL E. MAGEE, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition.

The petition presents an important question on which there is a conflict of authority. That question is the same as that involved in *Graham and Foster, Co-partners, etc.* v. *Goodcell, Collector,* No. 589, October Term, 1929, writ of certiorari granted March 3, 1930, which is now before this Court. Both cases involve the question whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (R. 14–15) should be construed to deprive the petitioner of the right which he otherwise would have had to recover taxes which had been collected after the statutory period of limita-

tion had expired, and if so construed, whether it is in violation of the Fifth Amendment.

The pertinent dates are as follows (R. 6, 10, 11):

February 27, 1917, return for 1916 filed.

February 27, 1920, expiration of three-year period for assessment of tax.

October, 1921, additional assessment made.

November 15, 1921, claim in abatement filed.

February 27, 1922, expiration of five-year period for assessment and collection of tax.

February 12, 1924, claim in abatement partially rejected.

May 23, 1924<br>June 17, 1924 } tax collected.<br>July 11, 1925

December 12, 1927, claim for refund filed.

The Court of Claims in an opinion (R. 12) reported in 37 F. (2d) 763, in accord with the decision of the Circuit Court of Appeals for the Ninth Circuit, in *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, 35 F. (2d) 586, *supra*, decided that Section 611 of the Revenue Act of 1928 barred recovery in this case. The position of the United States is supported by three other decisions of the Court of Claims. *Oak Worsted Mills* v. *United States*, 36 F. (2d) 529; *Gotham Can Co.* v. *United States*, 37 F. (2d) 793, petition for certiorari filed April 21, 1930 (No. 832, October Term, 1929), and *Taft Woolen Co.* v. *United States*, decided March 3, 1930.

The further question raised by the petition for certiorari, we submit, does not warrant the consideration of this Court. The petitioner argues that the assessment of the tax more than three but less than five years from the date of the return was illegal under the provisions of Section 9 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 763. But even if this section did establish a three-year limitation on assessment, as petitioner contends, it was superseded by Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, which applies retroactively to validate just such an assessment:

> (d) *The amount of income,* excess-profits, or war-profits *taxes due* under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or *under prior income,* excess-profits, or war-profits tax *Acts,* or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, *shall be determined and assessed within five years after the return was filed,* unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax: * * *. (Italics ours.)

Congress has here expressly made the five-year period for assessment apply to taxes due under prior Income Tax Acts, including those due under the Revenue Act of 1916. The fact that the assessment was made in October, 1921, before the passage of the Revenue Act of 1921 on November 23, 1921, does not seem to be material. Section 263 of the Act expressly provides that Title II, including Section 250, "shall take effect as of January 1, 1921."

We submit that the decision of the Court of Claims upon this further point was correct. See *Campbell* v. *Holt,* 115 U. S. 620. There is no conflict of authority upon this question. We suggest that the Court limit its review to the question of the effect and validity of Section 611 of the Revenue Act of 1928.

Respectfully submitted.

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MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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CHARLES ELMORE

Nos. 65, 104, 105, and 323

# In the Supreme Court of the United States

OCTOBER TERM, 1930

PERCIVAL E. MAGEE, PETITIONER

*v.*

THE UNITED STATES

OAK WORSTED MILLS, PETITIONER

*v.*

THE UNITED STATES

TAFT WOOLEN COMPANY, PETITIONER

*v.*

THE UNITED STATES

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, MICHIGAN, TRUSTEE OF THE ESTATE OF WELLINGTON R. BURT, DECEASED, PETITIONER

*v.*

THE UNITED STATES

*ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS*

**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1930

---

No. 65

PERCIVAL E. MAGEE, PETITIONER

*v.*

THE UNITED STATES

---

No. 104

OAK WORSTED MILLS, PETITIONER

*v.*

THE UNITED STATES

---

No. 105

TAFT WOOLEN COMPANY, PETITIONER

*v.*

THE UNITED STATES

---

No. 323

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, Michigan, trustee of the estate of Wellington R. Burt, deceased, petitioner

*v.*

THE UNITED STATES

---

*ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS*

---

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the Court of Claims in the *Magee case* (R. 12–18) is reported in 37 F. (2d) 763. The

opinions in the *Oak Worsted Mills case* (R. 32–44, 45–54) are reported in 36 F. (2d) 529, and 38 F. (2d) 699. The opinion in the *Taft Woolen case* (R. 23) is reported in 38 F. (2d) 704. The opinion in the *Second National Bank case* (R. 13–14) is reported in 40 F. (2d) 129.

## JURISDICTION

*Magee case, No. 65*

The judgment of the Court of Claims was rendered January 20, 1930. (R. 10, 18.) The petition for certiorari was filed March 25, 1930. (R. 19.) Certiorari was granted May 19, 1930 (R. 21), 281 U. S. 713.

*Oak Worsted Mills case, No. 104*

The judgment of the Court of Claims was rendered December 2, 1929. (R. 44.) A motion for a new trial was denied on February 17, 1930. (R. 44–52.) The petition for certiorari was filed May 7, 1930. (R. 55.) Certiorari was granted June 2, 1930 (R. 57), 281 U. S. 717.

*Taft Woolen Co. case, No. 105*

The judgment of the Court of Claims was rendered March 3, 1930. (R. 23.) The petition for certiorari was filed May 7, 1930. (R. 23.) Certiorari was granted June 2, 1930 (R. 25), 281 U. S. 717.

*Second National Bank case, No. 323*

The judgment of the Court of Claims was rendered April 30, 1930. (R. 14.) The petition for certiorari was filed July 29, 1930. (R. 14.) Certiorari was granted October 20, 1930. (R. 15.)

The jurisdiction of this Court in all of the cases is conferred by Section 3(b) of the Act of February 13, 1925.

## QUESTION PRESENTED

The general question involved in the *Magee case* and the other cases in this group is:

Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

## STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra* pp. 17–18.

## STATEMENT

In the *Magee case* the petitioner filed his income-tax return for 1916 in February, 1917, and paid the tax shown thereon. The Commissioner of Internal Revenue later audited the return and assessed an additional tax of $6,911.30. Thereafter the Commissioner made another examination, as a result of which the additional assessment was increased to $64,982.12. (R. 10.) This amount was assessed in October, 1921, within the five years therefor as provided in Section 250 (d) of the Revenue Act of 1921. (R. 10.) After notice and demand for payment by the Collector, the petitioner filed a claim in abatement of the assessment, which was forwarded by the Collector to the Commissioner and by the Commissioner considered. (R. 10.) The Collector, in

accordance with the usual custom in such cases, delayed proceedings for the collection of the additional assessment and made no further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue. (R. 10–11.)

On April 19, 1923, the Commissioner advised petitioner of his proposed action on the claim for abatement, which was to abate the assessment except for $46,021.71. (R. 10.) The petitioner protested against the proposed action, and after further consideration by the Committee on Appeals and Review on August 9, 1923, the action of the Commissioner was sustained. On February 12, 1924, the Commissioner allowed the claim in abatement in the amount of $21,952.28 and rejected it in the amount of $43,029.84. (R. 11.) On May 13, 1924, the Collector made demand for payment of this amount. Payment was made in three installments in May and June, 1924, and July, 1925. (R. 11.) A claim for refund was filed by the petitioner on December 12, 1927, on the ground that the collection was out of time. (R. 11.) The claim was rejected and suit was instituted December 12, 1928. (R. 5.) The Government defended on the ground that Section 611 of the Revenue Act of 1928 barred recovery. The Court dismissed the petition.

In the *Oak Worsted, Taft Woolen,* and *Second National Bank cases* the material facts are as follows:

*Oak Worsted Mills case, No. 104*

Return filed June 16, 1919. (R. 29.)

Assessment made March, 1924. (R. 30.)

Claim in abatement filed April 12, 1924. (R. 30.)

Five-year period for collection expired June 16, 1924 (five years from filing of return).

Claim in abatement acted upon February 11, 1925. (R. 30.)

Collection made September 10, 1925. (R. 31.)

Suit brought April 4, 1928. (R. 7.)

Revenue Act of 1928 enacted May 29, 1928.

*Taft Woolen case, No. 105*

Return filed June 14, 1919. (R. 17.)

Assessment made March, 1924. (R. 18, 19.)

Claim in abatement filed between March 25, 1924, and April 18, 1924. (R. 19.)

Five-year period for collection expired June 14, 1924.

Claim in abatement acted upon November 25, 1924. (R. 19.)

Collection made June 1, 1925. (R. 20.)

Suit brought February 21, 1928. (R. 8.)

*Second National Bank case, No. 323*

Return filed April 1, 1918. (R. 11.)

Assessment made January, 1921. (R. 12.)

Claim in abatement filed February 17, 1921. (R. 12.)

Five-year period for collection expired April 1, 1923.

Claim in abatement acted upon May 24, 1923. (R. 12.)

Collection made October 12, 1923. (R. 12.)
Suit brought February 4, 1929. (R. 6.)

## SUMMARY OF ARGUMENT

Section 611 of the Revenue Act of 1928 should be construed to bar recovery of the taxes herein sought to be recovered. The suits being against the United States in the Court of Claims, recovery may be had only in accordance with the Acts of Congress. As Section 611 was enacted prior to suit in two of the cases and before trial in the other two, the Court of Claims properly applied the section. Section 611 has not been repealed and its enactment was constitutional.

## ARGUMENT

The facts in these four cases are similar and present the same questions of law. The discussion hereafter is directed to the *Magee case*. Wherever the facts in any of the other cases differ from the facts in the *Magee case*, the difference will be noted. The respondent submits the four cases under this one brief.

### I

### SECTION 611 OF THE REVENUE ACT OF 1928 SHOULD BE CONSTRUED TO PREVENT RECOVERY OF TAXES COLLECTED AFTER THE STATUTORY TIME THEREFOR HAD EXPIRED, IF CLAIM IN ABATEMENT WAS FILED AND THE COLLECTION STAYED

At the time the tax in the *Magee case* was collected the period for collection had expired, and the petitioner, having made timely claim for refund, which was rejected, was entitled to recover the amount so

collected. The record does not disclose the date of the rejection of the claim for refund, but suit was instituted December 12, 1928. Prior to the institution of the suit the Revenue Act of 1928 was enacted on May 29, 1928.[1] This Act contains Section 611 (p. 18, *infra*), which the respondent contends effectually bars recovery of the tax. The writ of certiorari in the present case was limited to a review of the question of the validity and effect of Section 611 of the Revenue Act of 1928. The questions of the construction and constitutionality of Section 611 are fully discussed in the respondent's brief in *Graham and Foster* v. *Goodcell*, No. 36, October Term, 1930. The same general questions are presented in that case as in the *Magee case*. There are three distinctions between that case and the instant one, namely: (1) In that case the suit was against the Collector; here it is against the United States. (2) In that case the claim in abatement was rejected before collection was barred; in this case the action on the claim in abatement was delayed until the period for collection had expired. (3) In that case the suit was instituted prior to the enactment of the Revenue Act of 1928 and during the life of Section 1106 (a) of the Revenue Act of 1926; in this case it was instituted after the enactment of the Revenue Act of 1928, which repealed Section 1106 (a) of the Revenue Act of 1926.[2] These distinctions,

[1] In the *Oak Worsted* and *Taft Woolen cases* suit was instituted April 4, 1928, and February 21, 1928, respectively.

[2] *Oak Worsted* and *Taft Woolen cases* were brought before the Revenue Act of 1928 was enacted.

if material, are in favor of the respondent in the instant case.

(1) Whatever may be said of the personal nature of the suit against a Collector to recover taxes erroneously collected by him, a suit against the United States in the Court of Claims to recover such payments is wholly subject to the will of Congress. That court is not a constitutional court and its jurisdiction and life are dependent upon Congress. *Ex parte Bakelite Corporation*, 279 U. S. 438.

(2) In the *Graham and Foster case* it is argued by the taxpayer that the claim in abatement was disposed of at a time when the collection period had not expired and that this fact should remove the case from the operation of Section 611 of the Revenue Act of 1928. That situation is not present in the instant case. The five-year period for collection in this case expired in February, 1922, and there was no action on the claim in abatement, which was filed in November, 1921, until April, 1923. The Collector during all that time was deferring collection pending the determination of the claim in abatement. (R. 10.)[3] The five-year period expired while the collection was deferred awaiting the determination of the claim in abatement.

(3) In the *Graham and Foster case*, it is also urged on behalf of the taxpayer that the institution of suit before the 1928 Act was enacted vested in the tax-

[3] The same is true in the *Second National Bank case*. (R. 13.) In the *Oak Worsted* and *Taft Woolen cases* there is no such finding.

payer the right to recover and prevented Section 611 of the Revenue Act of 1928 from affecting the case. That point can not be urged here.[4]

The decision of this Court in the *Graham and Foster case* will be decisive of this case unless the decision there is in favor of the taxpayer because of one of the three points mentioned above which are not in the instant case.

## II

### THE TAX COLLECTED IN THIS CASE WAS TIMELY ASSESSED AND A CLAIM IN ABATEMENT WAS FILED

The petitioners' briefs here filed make a number of contentions all of which, except three, are raised in the briefs filed on behalf of the petitioners in the *Graham and Foster case*, No. 36, present term, and are discussed in the respondent's brief in that case and are not repeated here.

The three contentions not so discussed are: (1) The tax was not assessed within the period of limitations; (2) the claim in abatement was illegal; (3) Section 611 has been repealed by a later Act.

The third of these contentions is discussed *infra*, pp. 10–15. We submit that the first two of these contentions do not fall within the scope of the limited review granted in this case. (R. 21.)

Moreover, they are not tenable. While the first relates to a matter which was set forth in the petition for the writ in this case, it involves a construction of Section 9 (a) of the Revenue Act of 1916 and Sec-

[4] Suit was instituted in the *Oak Worsted* and *Taft Woolen cases* prior to enactment of the Revenue Act of 1928.

tion 250 (d) of the Revenue Act of 1921 (*infra*, p. 17). Section 250 (d) by clear terms is made applicable to the assessment of tax for the year in question.

As to the second contention, petitioner's brief does not set forth any reason why the claim in abatement was not legal but rests this contention upon a quotation from Section 250 (d) of the Revenue Act of 1921. (Petitioner's Brief, p. 17.) If answer is needed to this, it is that as the taxpayer secured the object desired by the claim in abatement, namely, delay in collection, it should not now be heard to question the legality of the means which it employed. Cf. *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, 464; *United States* v. *John Barth Co.*, 279 U. S. 370, 376. The assessment was made within the five-year period prescribed by Section 250 (d) of the Revenue Act of 1921 and the legality of the claim in abatement can not be questioned.

## III

### SECTION 611 WAS NOT REPEALED BY THE ACT OF MAY 29, 1928, C. 901, SEC. 3, 45 STAT. 986, 996

Section 3220 of the Revised Statutes, as amended by the Revenue Act of 1918, was as follows:

> The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy

> collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section. [Sec. 1316(a) Revenue Act of 1918, c. 18, 40 Stat. 1057, 1145.]

This section was reenacted by Section 1315 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 314) and again by Section 1011 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 342), both times without change. Section 1111 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 115) amended the section by inserting a clause at the beginning of the section so as to make it read:

> Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926 the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, * * *.

Section 284 of the Revenue Act of 1926 placed certain limitations on the granting of credits and refunds in cases of income, war-profits, and excess-profits taxes, all made necessary because of the finality of the decisions in such cases after appeal to the Board of Tax Appeals. Section 319 of the

Revenue Act of 1926 contained similar limitations in the case of estate taxes.

The Revenue Act of 1928, which contains Section 611, here involved, also amended Section 3220 of the Revised Statues, as follows:

> SECTION 619. (b) Section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926, is amended by striking out "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926" and inserting in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." (C. 852, 45 Stat. 791, 878.)

The Revenue Act of 1928 contained provisions similar to Sections 284 and 319 of the Revenue Act of 1926, all in some way limiting the Commissioner in his broad power to refund taxes. We are contending in this group of cases that Section 611 was likewise a limitation on the authority given the Commissioner by Section 3220.

On May 29, 1928, the President approved the Revenue Act of 1928 and also an Act entitled "An Act To discontinue certain reports now required by law to be made to Congress." Section 3 of this Act (c. 901, 45 Stat. 986, 996) is as follows:

> SEC. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:
>
> "REFUNDMENTS; TAXES AND PENALTIES.—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary

> of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, *by internal-revenue districts and alphabetically arranged of all refunds in excess of $500*, at the beginning of each regular session of Congress of all transactions under this section. (Italics ours.)

The taxpayers contend that the Act containing the section just quoted was enacted after the Revenue Act of 1928. We maintain that it does not appear that this is so, and that even if the section just quoted were enacted after the Revenue Act of 1928 it does not operate to repeal Section 611 of the Revenue Act.

The Revenue Act of 1928 was approved by the President at 8 A. M. on May 29, 1928 (45 Stat. 791, 883). It is the custom to indicate the hour of approval of Tariff and Revenue Acts, but we are informed that no record is kept of the time of the signature of

other Acts. The Statutes at Large do not show at what hour of the day the Act upon which the taxpayers rely was approved by the President. As there is nothing in the record showing the hour of approval, we submit that the Act to Discontinue Reports can not be said to be later than the Revenue Act of 1928. Cf. *Lapeyre* v. *United States*, 17 Wall. 191, 198; *Burgess* v. *Salmon*, 97 U. S. 381, 383. Furthermore all Acts passed at the same session of the legislature should be construed together as one enactment. Sutherland, Statutory Construction (2d. ed.), Section 268. As so construed, there is no difficulty in reconciling the two acts here in question.

The addition made to Section 3220 by the Revenue Act of 1928 and that made by the Act to Discontinue Reports are quite consistent and were both in force as parts of Section 3220 at the end of the first session of the Seventieth Congress.

Even if it were established that the Act to Discontinue Reports was approved later than the Revenue Act of 1928, and that the two provisions were irreconcilable, it would merely have the effect of amending Section 3220 so as to strike out the exception clause. A repeal of Section 611 by this would not necessarily follow. The addition to Section 3220 which was made by the Act to Discontinue Reports was as to the manner and form of the reports of the Commissioner of Internal Revenue to Congress of refunds allowed pursuant to Section 3220 of the Revised Statutes. (Italicized *supra*.) This case, we submit, forcibly shows the reason for the

frequently quoted statement that repeals by implication are not favored. Here, Congress, in dealing directly with the authority of the Commissioner to refund taxes, has prescribed certain limitations. In another Act enacted at nearly the same time, Congress, in dealing with routine reports, has prescribed the forms in which certain reports of activities should be made. It is not to be presumed that by this Act Congress did more than what it purported to do throughout that Act, that is, eliminate certain reports and prescribe forms which other reports should take. This is expressly stated to be the purpose of the Act in its preamble.

Repeals by implication are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both. *United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601. And where, as here, there is a special provision (Section 611 of the Revenue Act of 1928) and a general provision (the amended Section 3220) the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special provision is intended to remain in force as an exception to the general provision. *Townsend* v. *Little*, 109 U. S. 504, 512; *Rodgers* v. *United States*, 185 U. S. 83, 87–89. In the present case both statutes, Section 611 and Section 3220 R. S., as amended, can be given reasonable operation if this presumption is recognized. *Washington* v. *Miller*, 235 U. S. 422, 428.

## CONCLUSION

The judgments should be affirmed.

Respectfully submitted.

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DECEMBER, 1930.

## APPENDIX

The Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part as follows:

> SEC. 250 (d). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875 (U. S. C. Sup. III, Title 26, Secs. 2607, 2611, 2612) provides in part as follows:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

* * * * *

SEC. 611. COLLECTION STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

SEC. 612. REPEAL OF SECTION 1106(a) OF 1926 ACT.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

U. S. GOVERNMENT PRINTING OFFICE : 1930

## MAGEE *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 65. Argued December 9, 1930.—Decided January 26, 1931.

1. Decided in part upon the authority of *Graham* v. *Goodcell, ante,* p. 409. P. 433.
2. The time limitation on assessment prescribed by § 250 (d) of the Revenue Act of 1921, was properly applicable to an additional assessment of 1916 income taxes, made in October, 1921, before the Act was passed. P. 434.

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[19] See Note 7.

3. A taxpayer who has benefited by his claim in abatement is not in a position to contest its legality. P. 434.

37 F. (2d) 763; 68 Ct. Cls. 771, affirmed.

CERTIORARI, 281 U. S. 713, to review a judgment denying a claim for refund of an income tax payment.

*Mr. Theodore B. Benson,* with whom *Mr. William Meyerhoff* was on the brief, for petitioner.

*Assistant Attorney General Rugg,* with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *George H. Foster,* and *Erwin N. Griswold* were on the brief, for the United States.

Mr. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The petitioner filed his income tax return for 1916 in February, 1917. In October, 1921, the Commissioner of Internal Revenue assessed an additional tax, and in November, 1921, the petitioner filed a claim in abatement. In 1924, the Commissioner allowed the claim in abatement for a portion of the amount claimed and rejected it as to the residue, which the petitioner then paid, upon the collector's demand. In December, 1927, the petitioner filed a claim for refund, which was rejected, whereupon this suit was brought in the Court of Claims in December, 1928, to recover the amount paid. The court dismissed the action, applying section 611 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875), 37 Fed. (2d) 763. This Court granted a writ of certiorari, 281 U. S. 713.

The questions presented with respect to the construction and validity of section 611 are the same as those considered in *Graham* v. *Goodcell, ante,* p. 409. The petitioner contends, however, that this section does not apply to his case, upon the ground that the tax was not assessed within the three-year period of limitation prescribed by

section 9 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 763). The Court of Claims held that the assessment was valid under the provisions of section 250 (d) of the Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 265). We think the court was right in construing this statute as applicable to the assessment, although previously made, and hence that the tax was assessed "within the period of limitation properly applicable thereto," as required by section 611 of the Revenue Act of 1928.

The petitioner also insists that his claim in abatement was illegal under section 250 (d) of the Revenue Act of 1921. We do not find that there was any statutory prohibition of the filing of a claim in abatement in the circumstances here shown. The taxpayer benefited by the claim and is not in a position to contest its legality. Compare *United States* v. *The John Barth Company,* 279 U. S. 370, 376; *Florsheim Brothers Dry Goods Company, Limited,* v. *United States,* 280 U. S. 453, 464. The case falls within section 611 of the Revenue Act of 1928 and this precludes recovery.

*Judgment affirmed.*